112-41

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~361~~ 56

REBECCA R. MELLEN, APPELLANT,

vs.

SUSAN L. WALLACH.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 8, 1881.

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1 *Bill for Injunction and Account. Filed Jan. 29, '74*

In the Supreme Court of the District of Columbia, sitting in Equity.

CATHARINE BURCHE
vs.
SUSAN LAVINIA WALLACH & J. C. G. KENNEDY. } No. 3571. Eq. Doc. 13.

To the honorable the justices of the supreme court of the District of Columbia, sitting in equity:

Your oratrix, Catharine Burche, wife of Raymond W. Burche, hereby showeth to your honors:

1st. She sues in her own right.

2d. She is a citizen of the United States of America, and born in the District of Columbia.

3d. That on the 20th day of July, in the year eighteen hundred and thirty-nine, her father, William Hewitt, late of the district aforesaid, deceased, departed this life, seized in fee-simple of
2 the following parcel of real estate, lying, situate, and being in the city of Washington and District of Columbia, known and described as parts of lot one (1) and two (2), in square four hundred and fifty-seven (457), beginning for the same at the southeast corner of said square; thence running north on sixth street fifty-four feet eleven inches; thence west one hundred and sixteen feet nine inches; thence south fifty-four feet eleven inches to D street; east one hundred and sixteen feet eleven inches, together with the easements, hereditaments, and appurtenances to same belonging.

4th. That by his last will and testament, duly admitted to probate and executed to pass real estate, he devised the said real estate for life to his wife, Susan L., mother of this plaintiff, with remainder over after her death to his children, Thomas, Lavinia, Rebecca, and this plaintiff, and she prays leave to refer to said will as part hereof.

5th. She further showeth that both said Thomas and said Rebecca died intestate, and neither left any children surviving
3 or any encumbrance upon said real estate; that the plaintiff's mother died 15th December, in the year eighteen hundred and seventy-two.

6th. That prior to the death of the plaintiff's said mother, and after the death of the said Rebecca and the said Thomas, by a family compact, made verbally between the plaintiff and the defendant, Lavinia, and with the knowledge and approbation of her then husband, Charles S. Wallach, then living, now deceased, the defendant, Lavinia, agreed to take possession of said real estate, then improved with a three-story dwelling and back building, and a wing attached, and out of the income derived from the estate of her father, the said William Hewitt, to support the mother of the plaintiff, and the defendant, Lavinia, to pay the taxes, insurance, and repairs on said property; the words of said agreement being, as nearly as can be ascertained, as follows in substance and effect:

"When Mrs. S. L. Hewitt was seized with paralysis, the
4 following arrangement was agreed upon by Mrs. V. M. Wiltberger and Mrs. S. L. Wallach (the defendant), and concurred in by Mr. R. W. Burche and Mrs. K. H. Burche (the plaintiff):" That Mrs. Wallach was to take her mother with her, and tend to her comfort and support, and take possession of Mrs. Hewitt's property, draw the rents, meet its expenses, and manage it as Mrs. Hewitt had been in the habit of doing herself, without interference from any other party.

(Signed) MRS. V. M. WILTBERGER.

That under said agreement the said Lavinia subsequently took possession of the said land and improvements, and there resided with her said husband and family, and her said mother until her mother's death as aforesaid.

7th. That after the death of their said mother, the said Lavinia continued to occupy said real estate, sub-letting portions thereof, suffering the taxes and assessments thereon, together with taxes and assessments due before the death of her mother, to be and become due to a very large amount, to wit, $946.57, and
5 wholly refusing to pay any rent therefor, without paying any rent, though often demanded thereto by the plaintiff and her authorized agents.

8th. That prior to the death of their said mother, she and the defendant, Lavinia, executed a note, jointly and severally, dated the 15th day of January, A. D. 1872, to one Rebecca R. Mellen, for $5,000, and to secure the payment of the same conveyed the said land to the defendant, J. C. G. Kennedy, by a good and sufficient deed of trust, with power therein to sell the same upon the request in writing of the said Rebecca R. Mellen upon default made as provided in said deed; the original of which is herewith filed as part hereof.

6 *Deed of Trust to J. C. G. Kennedy.*

Stamp $5. Recorded January 18th, 1872—2.45 p. m.

CHARLES S. WALLACH *et al.* to JOS. C. G. KENNEDY. } Trust.

This indenture, made this fifteenth day of January, in the year of our Lord one thousand eight hundred and seventy-two, by and between Charles S. Wallach and Lavinia, his wife, and Raymond W. Burche and Catharine, his wife, of the first part, and Joseph C. G. Kennedy, of the second part. Whereas the said party of the first part stands justly indebted to Rebecca R. Mellen in the sum of five thousand (5,000) dollars, for which amount they have given their note jointly and severally, payable at the end of five years, with interest, at the rate of ten per centum per annum, payable in quarterly instalments; and whereas the said party of the first part are desirous to secure the full and punctual payment of said debt,

and all interests, costs, and expenses that may accrue thereon according to the true intent and meaning of the aforesaid
7 promissory note: Now, therefore, this indenture witnesseth, that the said party of the first part, in consideration of the premises and of the sum of one dollar to them in hand paid by the said party of the second part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, aliened, enfeoffed, conveyed and confirmed, and by these presents do grant, bargain and sell, alien, enfeoff, convey and confirm unto Jos. C. G. Kennedy, or his successor or successors, in trust, all that certain piece and parcel or portion of ground in the city of Washington known and described in the plat books and official records as parts of lots one (1) and two (2), in square four hundred and fifty-seven (457), the same fronting fifty four $\frac{11}{12}$ feet (54 feet 11 inches) on Sixth street west, and one hundred and sixteen $\frac{9}{12}$ (116 feet 9 inches) feet on D street north, together with all and singular the improvements, privileges, hereditaments, and appurtenances to the same belonging or in any manner appertaining. To have and to hold the same unto and to the use of the said party of the second part,
8 and his successor or successors, in trust, nevertheless for the uses and purposes following, and none other, that is to say, to suffer and permit the said party of the first part, their heirs and assigns, to have, hold, use, occupy, possess, and enjoy the said premises with the appurtenances as afore described, and the rents, issues, and profits of the same to take, receive, and apply to their own use until some default or failure shall have been made in the payment of the said debt to the said party, &c., of the second part, or to the holder of the note aforesaid, or of any part thereof, or of any proper interest, costs, and charges thereon, or which may accrue thereon, and upon any and every such default or failure being made in the payment as aforesaid, the said party of the second part, his successor or successors, shall, at the request in writing of the said Rebecca R. Mellen or the holder of the note aforesaid, proceed to sell and dispose of the said premises as afore described, or so much thereof as the said party of the second part or suc-
9 cessor or successors may deem necessary at public sale to the highest bidder, upon such terms and conditions as he may deem most for the interest of all parties concerned in said sale, first giving at least ten days' notice of the time, place, and term of said sale by advertisement in some newspaper printed and published in the city of Washington, and such sale to repeat or postpone from time to time as the said paaty of the second part, or his successors, may deem expedient, and out of the proceeds arising from such sale or sales (after paying the proper expenses thereof, and other expenses of this trust, including a commission on the gross amount of said sale or sales of three per centum as compensation to said trustees for his or their trouble and diligence in executing this trust, to pay in the first place whatever of said debt, interest, costs, and expenses, may be due and unpaid at the time of such sale or sales. Secondly, to pay whatever of said debt, interest, costs, and ex-

"When Mrs. S. L. Hewitt was seized with paralysis, the
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(Signed) MRS. V. M. WILTBERGER.

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and all interests, costs, and expenses that may accrue thereon according to the true intent and meaning of the aforesaid
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8 and his successor or successors, in trust, nevertheless for the uses and purposes following, and none other, that is to say, to suffer and permit the said party of the first part, their heirs and assigns, to have, hold, use, occupy, possess, and enjoy the said premises with the appurtenances as afore described, and the rents, issues, and profits of the same to take, receive, and apply to their own use until some default or failure shall have been made in the payment of the said debt to the said party, &c., of the second part, or to the holder of the note aforesaid, or of any part thereof, or of any proper interest, costs, and charges thereon, or which may accrue thereon, and upon any and every such default or failure being made in the payment as aforesaid, the said party of the second part, his successor or successors, shall, at the request in writing of the said Rebecca R. Mellen or the holder of the note aforesaid, proceed to sell and dispose of the said premises as afore described, or so much thereof as the said party of the second part or suc-
9 cessor or successors may deem necessary at public sale to the highest bidder, upon such terms and conditions as he may deem most for the interest of all parties concerned in said sale, first giving at least ten days' notice of the time, place, and term of said sale by advertisement in some newspaper printed and published in the city of Washington, and such sale to repeat or postpone from time to time as the said paaty of the second part, or his successors, may deem expedient, and out of the proceeds arising from such sale or sales (after paying the proper expenses thereof, and other expenses of this trust, including a commission on the gross amount of said sale or sales of three per centum as compensation to said trustees for his or their trouble and diligence in executing this trust, to pay in the first place whatever of said debt, interest, costs, and expenses, may be due and unpaid at the time of such sale or sales. Secondly, to pay whatever of said debt, interest, costs, and ex-

penses, may then remain unpaid, although the same may not then have become due and payable, and lastly, the surplus, if any,
10 to pay over to the said party of the first part, their heirs, executors, administrators, or assigns, or in the event of any such sale or sales under the provisions of this trust, the said trustees are empowered to convey to the purchaser or purchasers all the right, title, and estate, legal and equitable, of the said party of the first part in and to the premises sold, and upon any and every such sale and conveyance, the terms thereof being complied with to the satisfaction of said trustee so selling, the said parties of the first part shall surrender to such purchaser his, her, or their proper representative, the full and peacable possession of the premises sold; and the said party of the first part, theirs heirs, executors, administrators, and assigns, hereby covenant and agree with the said party of the second part, his successors, heirs, and assigns, to cause and procure the said premises, with the appurtenances, to be insured and constantly during the continuance of this trust to be kept insured against loss or damage by fire in some insurance office of good credit in an amount not less than —— dollars, in the
11 name or assigned to the use of the said party of the second part, as trustee, and in case of any default herein it shall and may be lawful for, but it shall not be obligatory upon, the said trustee or party of the second part, or their heirs and assigns, to procure such insurance to be made, and the expense thereof, as well as of any taxes the payment whereof may become necessary, shall thereupon become a debt due and owing by the said party of the first part, the payment of which shall be secured by this present instrument in all respects equally as if it contained a part of said debt now owing by the said party of the first part, and every provision herein contained were expressly made applicable thereto.

In testimony whereof the said parties of the first part hereunto set their hands and seals the day and year first hereinbefore written.

CHAS. S. WALLACH. [SEAL.]
LAVINIA WALLACH. [SEAL.]
RAYMOND W. BURCHE. [SEAL.]
CATHARINE BURCHE. [SEAL.]

Signed, sealed, and delivered, being first stamped $——U. S. revenue, in presence of—

---

12 DISTRICT OF COLUMBIA, } ss:
County of Washington, }

I, Frederick Koones, a notary public in and for the county of Washington and District aforesaid, do hereby certify that Charles S. Wallach and Raymond W. Burche, parties to a certain deed bearing date on the fifteenth day of January, A. D. 1872, and hereto annexed, personally appeared before me, in my county aforesaid, the said Charles S. Wallach & Raymond W. Burche being personally well known to me as the persons who executed the said deed and acknowledged the same to be their act and deed.

Given under my hand and notarial seal, this sixteenth day of January A. D. eighteen hundred and seventy-two.

[SEAL.] FRED'K KOONES, *Notary Public.*

DISTRICT OF COLUMBIA, *County of Washington*, } *ss:*

I, Frederick Koones, a notary public in and for the county of Washington and District aforesaid, do hereby certify that La-
13 vinia Wallach, wife of Charles S. Wallach, and Catharine Burche, wife of Raymond W. Burche, parties to a certain deed bearing date on the fifteenth day of January, A. D. 1872, and hereto annexed, personally appeared before me in my county aforesaid, and the said Lavinia Wallach and Catharine Burche being personally well known to me as the person- who executed the said deed, and being by me examined privily and apart from their husbands, and having the deed aforesaid fully explained to them, they, the said Lavinia Wallach and Catharine Burche, acknowledged the same to be their act and deed, and declared that they had willingly signed, sealed, and delivered the same, and that they wished not to retract it.

Given under my hand and notarial seal, this sixteenth day of January, A. D. eighteen hundred and seventy-two.

[SEAL.] FRED'K KOONES, *Notary Public.*

14 9. The said deed was duly executed and recorded, as appears by its exhibit, but the plaintiff says she relied entirely upon, and had no other means to look to for the payment of her portion of the interest, on said note, than the one moiety or half part of the rent of said land and premises, at the rate agreed upon between her and her said sister, Lavinia, to wit, $100 per month, which facts were well known to the said Lavinia, who disregarded the same, and by reason of her not paying said rent, default in payment of said interest was made, and under the provisions of said deed of trust, the said land and premises were duly sold at public auction in strict conformity with said deed, and at said sale the said Lavinia, by her agent, Richard L. Wallach, bid $16,000.00, and the plaintiff, by her agent, bid $16,500.00, and was the highest bidder and bought said property, and has complied with the terms of sale.

10. That pending the life of the said note, and with a view
15 to an amicable settlement of family affairs affecting the disposition of their several interests in said property, plaintiff being in straitened circumstances and having a large family, entered into a certain written stipulation or agreement of reference, under seal, a true copy of which is herewith filed, marked R. B. No. 1, as part hereof.

Agreement R. B. No. 1.

Whereas matters of dispute and difference have arisen between the undersigned, touching an agreement heretofore entered into

between them as to the application of the rents of the real estate situate in the city of Washington and the District of Columbia, known and distinguished on the ground plot or plan of said city as part of lots one (1) and two (2), in square four hundred and fifty-seven (457), fronting fifty-four (54) feet eleven (11) inches on Sixth street west, and running back with that width one hundred and sixteen (116) feet nine (9) inches, (being part of the same property, whether properly described by metes and bounds or not, devised to said parties under the will of the late William
16 Hewitt, reference to which is made as a part hereof,) which said rents, for several years past, under said agreement, have been received by the undersigned, Lavinia Wallach; and also as to the disposition which shall be made of the said real estate now owned by them as tenants in common in fee simple, absolute; that is to say, whether the same shall be divided if the same can be divided or sold, in case it [is] not susceptible of an equal and just division; and the said parties have hitherto been unable to come to a settlement of said matters so as aforesaid in dispute between them, they and each of them, for herself, doth hereby agree to and with the other to submit all the said matters touching the said rents and real estate and the construction of the said agreement so in dispute to the arbitrament and award of Albert Pike and Joseph H. Bradley, both of the city of Washington, hereby mutually chosen by the said parties, and to such other third person as the said referees may choose, and endorse his name on these presents before entering on the said reference, the award of any two of the three made
17 in writing and copies thereof delivered to the said parties respectively on or before the —— day of October next, to be binding on the said parties, and in making the said award the said referees shall take testimony and ascertain what agreement, if any, was made between the said parties touching the said rents, and award accordingly, and they shall divide the said real estate if they shall find the same susceptible of a just and equal division between the said parties, and if the same cannot be divided justly and equally then power is hereby given to the said referees to sell the same at public auction to the highest bidder therefor, on such notice and such terms and conditions as to the said referees shall seem most expedient and best for the interest of all parties, and receive the cash proceeds of said sale and take notes payable to the respective parties hereto for the residue of said purchase money, and see that the same are well secured, and deliver the said notes to the said parties respectively; and out of the cash proceeds of said sale they shall first pay to themselves a reasonable compensation for their labor and care
18 in this behalf, not exceeding the ordinary fees for bills in chancery in cases of bills for partition and the commissions allowed by the court of chancery in chancery sales; next, divide the residue of said proceeds into two equal parts, and if either of the parties hereto shall, upon an account stated between them according to the true interpretation of the said agreement of the said parties as to the rent aforesaid, either of said parties shall be found indebted to the other, they shall, out of the portion as assigned to

said debtor, pay to the other the balance which may be so found due, and also the one-half of said cash proceeds, and the residue thereof to the other party.

And the said parties hereto mutually bind themselves and herself to abide by, keep, and perform whatsoever award shall and may be hereafter made in the premises by said referees or the majority of them.

In testimony whereof, said Catharine Burche and Lavinia Wallach have hereunto set their respective hands and seals, on this 27th day of September, one thousand eight hundred and seventy-three.

(Signed) CATHARINE BURCHE. [SEAL.]
" LAVINIA WALLACH. [SEAL.]

Witness: (The words "part of" having been inserted.)
(Signed) A. B. DUVALL, *as to Mrs. Burche.*

19 That said referees first duly appointed a third referee, and after a full examination and hearing all the testimony produced by the plaintiff and his said sister, upon full notice to all parties, unanimously made the award filed herewith, marked R. B No. 2, before the said sale, to wit, on the 8th day of December, 1873.

20 *R. B. No. 2. Award.*

We, the undersigned, Albert Pike and Joseph H. Bradley, having accepted the offices conferred upon us in and by the submission signed by Catharine Burche and Lavinia Wallach, hereto annexed, did, on the 23d day of October, 1873, pursuant to and in part execution of the authority therein and thereby conferred on us, as the first act to be done by us under the same, meet and appoint Philip A. Darneille as the third referee under the said submission. And the said Philip A. Darneille having accepted the said appointment, we did endorse the same on the said submission; and thereupon we gave notice to the said parties to the same that we would meet at the hour of 11 o'clock a. m., on Friday, the 24th day of October, 1873, at the office of the undersigned, Joseph H. Bradley, when we would be ready to hear the claims and representations of the said parties, respectively, touching the matters submitted to us as aforesaid, and to receive such proofs as the said parties should see fit to produce. We accordingly met at the time and placed named as aforesaid, but after waiting more than an hour and a quarter, and neither party appearing, Mrs. Lavinia Wallach being
21 represented by her attorney, Mr. Oliver, we adjourned to meet at the same place on Monday, the 27th day of October, 1873, of which both parties had notice.

On Monday, the 27th day of October, 1873, Mrs. Burche filed her claim in writing, but the day being very inclement, neither party was present, and we adjourned to Wednesday, the 29th October, 1873, at the same time and place, of which both parties had notice.

On Wednesday, the 29th October, 1873, Mrs. Wallach, by her attorney, Mr. Oliver, filed her statement of her claims, and we pro-

ceeded to take testimony, Mrs. Burche being personally present, as was also her attorney, Mr. Jos. H. Bradley, Jr. And the testimony not being concluded on that day, we adjourned to the next day at the same hour and place.

Thursday, the 30th Oct., Mr. Darneille was not present, and we adjourned to Friday, the 31st October, at the same hour and place.

Friday, the 31st October, 1873, we met according to the adjournment, and Mrs. Burche being represented by her attorney and Mrs. Wallach by her attorney, further proof was taken, and the
22 parties not being able to close their case we adjourned to Monday, the 3d day of November, 1873, at the same time and place. Mr. Darneille not being present, but both parties being represented by their respective attorneys, Mr. Oliver for Mrs. Wallach filed further proofs, and we adjourned to the 5th November, 1873, at the same time and place, to make up our award, neither party having any further proofs to offer.

And now, on the 5th day of November, 1873, having duly considered the claims and admissions, and the proofs offered by the said parties respectively, we find that in the month of January, 1869, Mrs. Hewitt, the mother of Mrs. Wallach and Mrs. Burche, was the tenant for life of the premises mentioned in the said submission, and they were the only tenants in remainder; that the said premises were yielding an annual rent exceeding twelve hundred dollars a year; that Mrs. Hewitt was stricken with paralysis, and her said daughter agreed that Mrs. Wallach should take care of their said mother as long as she lived and take her place as to the said
23 property; and that as Mrs. Hewitt had borrowed money from Mr. W. B. Todd to pay special taxes on the property, Mrs. Burche should pay one-half of whatever was due on that account, and should be paid by Mrs. Wallach. It is in evidence that Mrs. Wallach paid forty dollars on that account. We further find that Mrs. Wallach, under that agreement, entered into possession of the said property, and so held it to the death of Mrs. Hewitt, which is admitted to have been on the 15th December, 1872.

We further find that Mrs. Wallach failed to pay the taxes assessed upon the said property prior to 30 June, 1872, to the amount of $598.80, and also taxes for the years 1872, 1873, $347.77.

We further find that Mrs. Wallach is responsible for one-half of the taxes due for the years 1872, 1873, being one hundered and seventy-three dollars and eighty-eight cents; she taking Mrs. Hewitt's place as tenant for life.

We further find that the amount of the taxes due by Mrs. Wallach is for taxes prior to June 30, 1872 ..... $598 80
and for tax to 1 January, 1873 ..... 173 88

$772 68

24 and they are a lien on her portion of said property, and are to be paid out of her portion of the proceeds of the sale of said property; and we further find, that she and her sister, Mrs. Burche, are jointly responsible for all taxes thereafter; that is, one half of the taxes for the year ending 30 June, 1873, and for all other taxes since that

date, and up to the time of such sale, as may be hereafter made of said property, and the said taxes are a lien on their joint interests in the said property, and to be paid out of their joint interest in the proceeds of such sale.

We further find that Mrs. Wallach and Mrs. Burche are jointly responsible for the funeral expenses of Mrs. Hewitt; we find these expenses amount to the sum of one hundred and thirty-seven dollars; that Mrs. Wallach has paid fifty-five dollars, part thereof, and she now owes thirteen dollars and fifty cents; that Mrs. Burche has paid no part thereof, and owes sixty-eight dollars and fifty cents, and that each of said sums is to be paid to R. F. Harvey, the undertaker, out of the respective portions of the said parties in the proceeds of the said sale of said property.

We further find that after the death of Mrs. Hewitt, on the 15 December, 1872, Mrs. Wallach held over and retained possession of said premises without any new agreement with Mrs. Burche, and still holds the same, and we find the rent of said premises to be reasonably worth one hundred dollars per month; that she has paid no part thereof to Mrs. Burche, and will, on the 15th day of November, 1873, if she shall retain possession until that day, owe Mrs. Burche eleven months' rent for her one-half, amounting to $550 to to be paid to Mrs. Burche in cash by her, and out of her portion of the proceeds of the sale of the said property.

We find further that the said premises are incapable of a reasonable and just partition between the said parties.

We therefore find and award, that the said premises be sold, and that out of the proceeds of sale, and out of the portion of Mrs. Lavinia Wallach the — be paid—

1. To the District of Columbia		$772 68
8. To R. F. Harver, (balance of funeral expenses)		13 50
3. To Mrs. Catharine Burche, (rent)		550 00
		$1,336 18

And out of the proceeds of the portion thereof coming to Mrs. Catharine Burche, the sum of sixty-eight dollars and fifty cents be paid R. F. Harvey, balance of funeral expenses of Mrs. Hewitt, and twenty dollars to Mrs. Wallach on account of money paid by her to Mr. Todd for the said debt paid by Mrs. Wallack.

And out of the remainder of the said proceeds whatever sum may then be due to the District of Columbia for taxes duly assessed and due on said property, be paid to said corporation.

Witness our hands, this 8th day of November, 1873.

(Signed) ALBERT PIKE.
" JOS. H. BRADLEY.
" P. A. DARNEILLE.

True copy—
JOS. H. BRADLEY.

11. Nevertheless the plaintiff, ardently desiring to avoid litigation with her sister, after said award was submitted to said Lavinia, and full time allowed to her to carry the same into effect, and after ascertaining she would not comply with and perform the same, made several offers of compromise to her without succeeding in inducing the said Lavinia to accept either of the same, and thereby the plaintiff is compelled to invoke the aid of this honorable court.

12. That the plaintiff has paid the taxes and assessments so as aforesaid due by said Lavinia on said property, so far as the bills therefor could be obtained, and to enable her to do so has been obliged to borrow the money therefor, to wit, the sum of $3,200, and has to pay therefor interest at the rate of ten per centum per annum, in equal quarterly instalments, and said borrowed money and interest are secured by deed of trust on said premises.

13. The plaintiff further shows that, by the legal effect of the terms of said first-mentioned deed of trust, one-half part of the balance of the proceeds of sale, after payment of the promissory notes secured by said deed, with interest, costs of sale, taxes, and assessments, the sum of $4,408.60 apparently belongs to the defendant, Lavinia Wallach, and for which the said trustee has required this plaintiff to execute and deliver to him her negotiable notes, secured by a deed of trust on the premises, which this plaintiff has done, and lodged the same in the hands of said trustee, whereas, in truth and in fact, the larger portion of the aforesaid taxes and assessments are a lien upon said property and chargeable to the said Lavinia, and ought to be paid by her out of her portion of said proceeds of sale and deducted from said notes; but the said trustee is about to tender and deliver the aforesaid notes to the defendant Lavinia, whereby the said Lavinia will be enabled to negotiate the same, and thus inflict irreparable loss and damage upon this plaintiff, unless the said trustee and the said Lavinia are restrained by the order of this honorable court.

14th. That the plaintiff has been compelled to effect her said purchase upon borrowed money, paying ten per cent. interest therefor per annum,

15th. That the only property the defendant has is said notes and a small amount of furniture, and if the said notes are delivered to her, plaintiff cannot obtain any just accounting with said Lavinia for their joint and several interests in the said lands and premises.

Prayers.

To the end, therefore, that the defendants may full, true, and perfect answers make on their several and respective corporal oaths to the various matters and things set forth in this bill of complaint as fully as if the same were here repeated and they severally interrogated thereto, and that this cause be referred to the auditor of this court to state an account between the defendant ant Lavinia and this plaintiff of and concerning their several inter-

ests in said property, and that said Lavinia discover and disclose fully what rents she has received for said property and what taxes and repairs she has paid for the same, and crediting the plaintiff with her fair and equal portion of said rents from the day of the death of their said mother, said Susan L., until the plaintiff obtains possession of said premises, and such taxes and assessments and such parts of the costs and expense of said trustee's sales and interest on said debt secured by said deed, as the plaintiff has paid or secured to be paid upon said property or otherwise, and such other taxes or assessments as were due or imposed upon said premises, or which were equitably levied upon the same at the time of the said sale,

and that such balance as may be found upon such accounting
31 in favor of this plaintiff shall be deducted from the defendant Lavidias's share in the proceeds of the said sale; and also that the defendant Lavinia, by decree of this honorable court, be required, by a good and sufficient deed for said land and premises, to convey all her estate and interest therein to this plaintiff in fee simple; and that the defendant Kennedy be enjoined from delivering to the said defendant Lavinia, her agent or attorney, any portion of cash or notes for deferred payments for the plaintiff's purchase-money for said land and premises, or if he has so delivered the said notes, or any portion thereof, to the said Lavinia, that the said Lavinia be enjoined and restrained from negotiating or any way parting with or encumbering the said notes, or any of them or any part of them, until the final decree in this cause.

May it please your honors to cause the United States writs of subpœna and injunction to issue, addressed to the U. S. marshal of

the District of Columbia, commanding said defendants to
32 appear and show cause why the relief prayed in this bill should not be given, and that they also show cause at an early day, to be fixed by your honorable court, why such writs of injunction should not issue against them as prayed, and the plaintiff will ever pray, &c.

CATHARINE BURCHE.

I, Catharine Burche, the plaintiff in this cause, say that I have read over the annexed bill of complaint signed by me, and know the contents thereof, and that the facts stated therein of my own knowledge are true, and those stated on information derived from others I believe to be true.

CATHARINE BURCHE.

Subscribed and sworn to before me, this 29th of Jan'y, 1874.

R. J. MEIGS, *Clerk.*

By L. P. WILLIAMS, *Ass't Clerk.*

33 *Subpœna to answer Original Bill.*

In the Supreme Court of the District of Columbia. January 29, 1874.

CATHARINE BURCHE, Complainant,
against
S. LAVINIA WALLACH and J. C. G. KENNEDY, Defendants.
No. 3571. Equity Docket 13.

The President of the United States to S. Lavinia Wallach and J. C. G. Kennedy, defendants:

You are hereby commanded to appear in this court at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the original bill under pain of attachment, and such other process of contempt as the court shall award.

Witness D. K. Cartter, Chief Justice.

[SEAL.] R. J. MEIGS, *Clerk, &c.*
By R. J. MEIGS, *Ass't Clerk.*

Return of Marshal.

Sum'd J. C. G. Kennedy. Not to be found, Wallach.
Feb'y 14, 1874.

ALEX'R SHARP, *Marshal.*

34 *Order for Appearance of Absent Defendant.*

In the Supreme Court of the District of Columbia, the 8th day of April, 1874.

CATHARINE BURCHE *vs.* LAVINIA WALLACH. No. 3571. Equity Docket 13.

On motion of the plaintiff, by Mr. Jos. H. Bradley, Jr., her solicitor, it is ordered that the defendant, Lavinia Wallach, cause her appearance to be entered herein on or before the first rule day occurring forty days after this day, otherwise the cause will be proceeded with as in case of default.

By the court. A. WYLIE, *Justice, &c.*

35 *Answer of Def't Wallach. Filed Dec* 1, '74.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE *vs.* SUSAN LAVINIA WALLACH and J. C. G. KENNEDY. No. 3571. Equity Docket No. 13.

The separate answer of S. Lavinia Wallach to the bill of complaint of Catherine Burche against her and another exhibited in this cause.

This defendant, now and at all times hereafter, saving and reserv-

ing to herself any and all manner of benefit and advantage of exception which may be had to the many errors, uncertainties, and other imperfections in complainant's said bill contained for answers thereto, or to so much thereof as she is advised is material for her to make answer to, answering says:

1, 2, 3, 4 & 5. She admits that the allegations of the 1st, 2d, 3d, 4th, & 5th paragraphs of said bill are substantially true as therein stated.

36 6th. She denies that the matters and things stated in the 6th paragraph of said bill are true as therein stated; she denies that she agreed to support the said Mrs. Hewitt, mother of this respondent and of complainant, to pay the taxes, insurance, and repairs on said property, out of the income derived from the property of the said Mrs. Hewitt, but she avers, that in the month of January, 1869, the said Mrs Hewitt was the tenant for life of the certain pareel of land and premises mentioned in complainant's bill, and had no other property or estate whatever, except some household furniture of inconsiderable value; that she was then of very advanced age, was stricken with paralysis, and by reason of her mental and physical infirmities was utterly incapacitated to attend to her personal wants, or to any sort of business; that in the performance of filial duty, and as an act of common humanity, this respondent, at the earnest solicitation of the sister of Mrs. Hewitt, undertook and agreed to have her cared for, and to collect the rents of the aforesaid realty, and to apply them, as received, to the payment of her expenses. That said estate of Mrs. Hewit was a

37 freehold; that owing to the impossibility of collecting the rents from the tenant in said premises for two monts, and to the impossibility of getting a paying tenant during two other months, this respondent was without means of said Mrs. Hewitt to pay her expenses; that thereafter, to wit, on or about the first day of April, A. D., 1871, she entered into possession of the house, and from that time became chargeable with a rent equal to the rental value of said premises, which this respondent and the complainant, and the sister of Mrs. Hewitt, one Mrs. Charles H. Wiltberger, subsequently agreed, was $100 per month, being the same rent that the former tenant had agreed to pay; that from the said — day of January, 1869, up to the time of the death of said Mrs. Hewitt, (to wit, 15th December, A. D., 1872,) this respondent had the care of said Mrs. Hewitt, supported her, supplied her with nurses, clothing, and contributed in all respect to her maintenance and comfort, and paid out divers large sums of money thereupon, and for repairs,

38 insurance, and taxes of, in, and upon the said premises to a large amount, a full account whereof is herewith filed, marked Exhibit S. L. W., No. 1, and is prayed to be taken as part hereof:

Exhibit S. L. W. No. 1. Filed Dec. 1, '74.

Mrs. L. Wallach in ac. with estate of Susan L. Hewitt.

	Dr.	Cr.
For rent of property, including tenements:		
From Feb. 1, 1869, to Feb. 1, 1870	$1,200 00	
" " " 1870, " " " 1871	1,200 00	
" " " 1871, " " " 1872	1,200 00	
" " " 1872, " Dec. 16, 1872	1,050 00	
Credits:		
By amount p'd Mrs. Kane for Mrs. Hewitt's board for Feb'y and March, 1869		$90 00
By am't p'd fuel and lights, washing, &c		5 00
" " " servant (Amelia), 11 weeks at $5.00 per week		55 00
" " " extra nurses		6 50
" " " nourishment and medicines		50 00
" " " Mrs. Ballantyne, due from Mrs. Hewitt		20 00
" wages of nurse fr. Ap'l 1, 1869, to Feb. 1, 1870, 10 mo's @ $12 per mo		120 00
" board Mrs. Hewitt, 1 April, 1869, to 1 Feb., 1870, 10 mo's @ $60 per mo.		600 00
39 By clothing for Mrs. H		35 00
" carriage hire		5 00
By am't paid Mrs. Wilson for Mrs. H		66 00
" am't paid insurance on property		16 00
" " " taxes for year 1870		125 00
From Feb. 1, 1870 to Feb. 1, 1871:		
" am't p'd W. B. Todd on ac. Mrs. Hewitt (2 receipts)		40 00
" board Mrs. Hewitt, one year, $60 per mo.		720 00
Am'ts carried fow'd	$4,650 00	$1,963 50
Am't br't fowd	$4,650 00	$1,963 50
By am't p'd wages nurse, 1 year, $6 per mo		120 00
" am't p'd clothing		25 00
" " insurance		16 00
" taxes for 1871		322 65
" loss of rent by Crutchett, Aug. 1870		100 00
" " " " " Mrs. Bromaugh, Jan. 1871		100 00
For year from Feb. 1, '71, to Feb. 1, '72:		
By Mrs. Hewitt's board, 1 y'r @ $60 per mo.		720 00
40 By wages of nurse @ $10.00 per mo.		120 00
" am't paid clothing		25 00

By insurance	$16 00
" taxes p'd	304 73
" am't p'd F. P. Blair (gas fitting)	5 00
" " " (plumbing)	5 00
" " " "	5 28
" " Klenheim (bell hanging)	10 00
" loss of rent, house vacant Feb. and Mar. 1871	200 00
" am't p'd Moore, carpenter's work	78 75

From Feb. 1, 1872, to Dec. 15, 1872:

" Mrs. Hewitt's board, 10 mos., @ $60 per mo.	630 00
" wages nurse, 10½ mos. @ $10.00 per mo.	105 00
" clothing	25 00
" insurance	16 00
" am't p'd Schaffer (plumbing)	8 00
" " Paul Leary (plastering)	7 50
" " J. F. Nolan (repairing roof)	10 00
" " D. Hannan (plumbing)	6 00
" " Kidwell & Henderson (papering)	112 50
	$4,771 91

And spent thereupon more money than she had agreed to pay or was willing to have paid as rent for said property and
41 more than the rental value of said property; that it is not true that this respondent made the agreement stated in the 6th paragraph of complainant's bill or any such agreement, or any other agreement than that heretofore stated, viz.: To the factor of Mrs. Hewitt, to collect her income, and to apply the same to her necessities and obligations, and to so much and to such parts of said bill as pretends to set up any rights or equities by virtue of the said alleged parol agreement, this respondent prays the same advantage by this answer as if she had specially demurred to said bill.

7th. That it is true that after the death of said Mrs Hewitt, this respondent continued in the partial use and occupation of the said parcel of land and premises, and that this respondent did not thereafter pay any rent for the said property, and that it is not true that she agreed to pay to the complainant any rent therefor; but this respondent further answering, says that she offered to rent from the complainant her moiety of said property for any certain
42 time that complainant would agree upon and would pay her rent therefor, and offered to rent her moiety for $50 per month, but the complainant would make no agreement in the premises, but advertised the property for sale, and hindered and disturbed this respondent in the beneficial use and enjoyment of more than her own moiety thereof. This defendant does not know that the large sum of $946.57 was legally assessed and chargeable as taxes on said property during said time, and requires proof thereof.

8th. This respondent admits that on the 15th January, A. D. 1872, she and the complainant borrowed from one R. R. Mellen the sum of $5,000 for five years, and that they gave their joint and several note therefor, and to secure the payment of the same executed a deed of trust to the defendant Kennedy, and conveyed thereby the aforesaid parcel of land and premises with power of sale upon default in the payment of said note or of any quarterly instalment of interest thereon, and this respondent avers that she united with the complainant in said note and in borrowing said money at the earnest solicitation of the complainant.

43 9th. That it is true that the deed of trust to the defendant Kennedy was duly executed as alleged by the complainant, but it is not true as alleged that said complainant relied entirely upon, and had no other means to look to for the payment of her portion of the interest on said note than her moiety of said real estate, and it is utterly false that any such facts were well known to this respondent, or that they ever existed to be disregarded by her, for this defendant avers that at the time of the date of said loan the said Mrs. Hewitt was alive and continued to live for about one year thereafter, and that during the said Mrs. Hewitt's life time, the complainant could receive no income from said realty, and further answering this defendant denies that she made any express promise to pay rent to the complainant for said premises. She admits the said property was advertised to be sold on the 8th day of December, 1873, by said Kennedy, trustee, a copy of which advertisement is herewith filed, marked Exhibit S. L. W. No. 2, and is prayed to be taken as part hereof.

44 *Exhibit S. L. W. No. 2. Filed Dec.* 1, '74.

By Kelley & Gatchel, Aucts., southeast corner of Eleventh and F streets northwest.

Trustees' sale of valuable improved property on the northwest corner of Sixth and D streets northwest, at auction.

By virtue of a deed of trust, bearing date on the 15th day of January, A. D. 1872, and duly recorded in Liber 687, folio 463, *et seq.*, one of the land records in and for the District of Columbia, and at the written request of the party holding the note secured thereby, I shall proceed to sell at public auction, on Monday, the 8th day of December, A. D. 1873, at 4 o'clock p. m. on the premises, all those certain pieces or parcels of ground in the city of Washington, known and described on the plat books and official records as parts of lot one (1) and two (2) in square four hundred and fifty-seven (457) the same fronting fifty-four (4) feet eleven (11) inches on Sixth street west and one hundred and sixteen (116) feet nine (9) inches on north D street, with the improvements thereon.

45 Terms of sale: Five thousand dollars, with interest thereon, at the rate of ten (10) per cent. per annum, from January 15, 1873, together with the expenses of sale, in cash, and the balance at one and two years, for which the purchaser is to give his

notes, bearing interest at the rate of eight per cent. per annum, and secured by deed of trust on the property sold. Conveyancing at the cost of the purchaser. Two hundred and fifty dollars to be paid by the purchaser immediately after sale.

JOS. C. KENNEDY, *Trustee.*
KELLY & GATCHEL, *Auctioneers.*

But she denies that the said advertisement to sell was pursuant to the powers given in the aforesaid deed of trust, or that it purports to be in pursuance of said powers; that the deed of trust before mentioned, in which this respondent joined, is recorded in liber 667, fol. 463, of the land records of the District of Columbia, but the advertisement was to sell pursuant a deed recorded in liber 687 of said records, in which said deed this respondent
46 never joined. And further answering this respondent avers that she had paid her half of every quarter's interest that had accrued on said loan, and that no sale could be made under said deed of trust for any default of this respondent. This respondent is informed and believes that the said sale was not conducted according to the terms proposed in said advertisement; that said property so improved, as complainant's bill relates, was offered for sale, and pretended to be sold, together with the said extensive improvements, by the square foot; that said advertisement required the amount of indebtedness secured by said deed of trust, to wit, the sum of $5,000, with interest at the rate of 10 per cent. per annum, from January 15, 1873, to be paid in cash, whereas under the deed of trust in which the respondent joined, her moiety of every quarter's installment of interest had been regularly and promptly paid; that at said sale said property was purported to have been sold to one John B. Clagett, at and for the sum
47 of $2.58 per square foot, as this respondent is informed and believes, and not to the complainant; that said price of $2.58 per square foot is and was a grossly inadequate price for said property; that this respondent had offered a greatly larger sum therefor at private sale; and this defendant charges that the complainant at said sale, occasioned entirely by her own default, fraudulently combined with the defendant, J. C. G. Kennedy and the said Mellen to purchase the property on other and different terms from those offered to bidders at said auction sale, and to cheat and defraud this respondent of her moiety of said property, and of the value thereof. This respondent expressly denies that she bid at said sale, or that she had any agent acting in her behalf thereat, and she is informed and believes that no person whatever undertook or pretended to bid in her name, or on her behalf for said property at said sale; and that said Richard L. Wallach was not the agent of this defendant at said sale, nor in anywise authorized to act in her behalf thereat.

10th. This defendant admits that complainant and herself, by a stipulation in writing, agreed to refer all matters in dispute
48 between them to arbitration, and that said arbitrators made the said award, and this defendant avers that, by the terms

of the said submission and award, the complainant had easy, adequate, and complete remedies for all her complaints against this respondent, but instead of abiding by said award, the complainant, in violation thereof, combined with the said Kennedy trustee and said Mellen to defraud this respondent out of her interest in said property; and further answering, this defendant avers that said arbitrators, in making up their said award, committed a mistake, in fact, in assuming that $598\frac{80}{100}$ of taxes were due upon the life estate of said Mrs. Hewitt in said property, whereas, in truth as appeared before them in proof only, the sum of $346.00 became due and was left unpaid during said term, and committed a grievous error of law in adjudging a parole agreement to make a valid assignment of the freehold estate of said Mrs. Hewitt to this defendant, and this respondent avers that, for these errors of law and fact, the said award ought now to be vacated and set aside.

This defendant denies that complainant made at any time
49 any offer to compromise that was at all reasonable, or to correct the manifest and palpable error of said award, or even to abide by the terms of the award.

This defendant has no knowledge or information of the allegations of the 12th paragraph of bill, and says the same are not sufficiently explicit for her to answer, and she calls for proof of the items that have been legally charged for taxes, and how much the complainant has actually paid.

This defendant says that she has already answered the allegations of the 13th paragraph of bill, that the sale therein mentioned was irregular, invalid, and in fraud of this defendant's rights, and she prays the judgment of the court whether she shall be required to make further answer thereto.

This defendant has no knowledge of the matters alleged in paragraph 14 of complainant's bill, and can neither admit nor deny them, but, if the same are at all material, calls for proof.

This defendant admits that she is a widow, and in impoverished circumstances, and that her only means are the moiety of the real estate before mentioned encumbered with half the said loan
50 of $5,000, besides some household furniture.

And lastly, this respondent denies that by her said bill the complainant has made out any case to entitle her to discovery or relief from or against this defendant, and she craves the same benefit by this answer as if she had specially demurred to said bill or plead to the jurisdiction of your honorable court.

And having fully answered, she prays to be hence dismissed with costs.

S. LAVINIA WALLACH.

TH'S JESUP MILLER, *Sol'r.*
ROB'T M. HOOPER.
DAVID T. S. FULLER.

Personally appeared before me, S. Lavinia Wallach, and being by me sworn on the Holy Evangels of Almighty God, deposes and says that she has read the above answer by her subscribed, and

knows the contents thereof, and that the matters therein stated upon her personal knowledge are true, and those things stated on information and belief, she believes to be true.

S. LAVINIA WALLACH.

U. S. CONSULATE GENERAL.

Subscribed and sworn to before me, at Paris, France, on this the fourth day of September, A. D. 1874.

[SEAL.] A. T. A. TORBERT,
U. S. Consul General.

51 *Cross-Bill. Filed Dec.* 1, '74.

In the Supreme Court of the District of Columbia.

SUSAN L. WALLACH, Plaintiff, *vs.* JOSEPH C. G. KENNEDY, Trustee, RAYMOND W. Burche, Catherine Burche, his wife, Elizabeth Hain, and Rebecca R. Mellen, Defendants.	Equity Docket 13. No. 3571.

To the supreme court of the District of Columbia, holding an equity court for said district:

The plaintiff exhibits this her cross-bill in this cause, wherein she states as follows:

1st. That she is commorant in the District of Columbia, and brings this suit in her own right.

2d. That the defendants, except Elizabeth Hain, who is a citizen of Pennsylvania, are citizens of the District of Columbia,
52 and are sued, the defendant Kennedy as trustee, the defendants Catharine Burche and Elizabeth Hain in their own right, the defendant Raymond W. Burche in right of his wife, the said Catharine Burche, and the defendant Rebecca R. Mellen as beneficiary under the deed of trust to said defendant Kennedy.

3d. That the plaintiff and defendant, Catherine Burche, are the surviving children and heirs-at-law of William Hewitt and Susan Hewitt, his wife, both now deceased, and as such children and heirs-at-law they, on the 15th day of January, A. D. 1872, were entitled, under the will of their father, the said William Hewitt, to have and enjoy as tenants in common an estate in remainder in fee-simple at the termination of the life estate then existing and in the enjoyment of their mother, the said Susan Hewitt, in and to certain real estate in the city of Washington, in the said District of Columbia, more particularly known and described on the maps and ground plan of said city as parts of lots numbered one and two, in square numbered four hundred and fifty-seven, with the buildings
53 and appurtenances to the same belonging and appertaining.

4th. That on the said 15th day of January, A. D. 1872, the plaintiff and defendant, Catharine Burche, borrowed of the defendant, Rebecca R. Mellen, the sum of five thousand dollars, which they

divided equally between themselves, each receiving for her own sole and exclusive use and benefit the sum of twenty-five hundred dollars, the entire sum of money so borrowed to be repaid by them, with interest at the rate of ten per centum per annum, at or before the expiration of five years from said 15th day of January, A. D. 1872; the said interest to be paid in quarterly instalments at the end of each and every quarter, the first of such instalments to fall due and be payable on the 15th day of April, A. D. 1872.

5th. That in evidence of said indebtedness the plaintiff and her husband, Charles S. Wallach, and the defendant, Catherine Burche, and her husband, on said 15th day of January, A. D. 1872, executed and delivered to the said Rebecca R. Mellen their joint and several promissory note for the sum of five thousand dollars,
54 payable at or before the expiration of five years from said 15th day of January, A. D. 1872, with interest at the rate of ten per centum per annum, payable quarterly; and thereupon, in order to secure and make certain the payment of the principal and interest, as stipulated in and by said promissory note, they, on the said 15th day of January, A. D. 1872, conveyed to the defendant, Joseph C. G. Kennedy, by their certain deed, in fee simple, the hereinbefore described real estate, upon certain trusts in said deed mentioned and set forth, as will more fully and at large appear by reference to said deed, which was duly acknowledged by the parties grantors thereto, and recorded among the land records of said District of Columbia in liber 667, folio 463, of the land records of said District of Columbia, a copy of said deed being herewith exhibited, marked Exhibit A, and asked to be considered as part of this bill. (See pp. 6, 13.)

6th. That the said Charles S. Wallach and Susan Hewitt are both now dead, the said Charles S. Wallach having departed this
55 life on the 3d day of February, A. D. 1872, and the said Susan Hewitt on the 15th day of December next thereafter.

7th. That at the time of the death of the said Susan Hewitt the plaintiff was, and had been for a period of time anterior thereto, in the occupancy and enjoyment of said real estate and the buildings and appurtenances thereunto belonging and appertaining, charged with the care and maintenance of the said Susan Hewitt, whose advanced age and physical and mental infirmities incapacitated her from taking care of herself or attending to business, and made necessary the constant ministrations and attention of others for her safety and comfort.

8th. That the plaintiff remained in the possession, but not undisturbed enjoyment, of said real estate and buildings and appurtenances from the death of the said Susan Hewitt up to and until the 15th day of January, A. D. 1874, when she removed therefrom, and the same were then, and are now, in the possession and under the control of the defendants, Raymond W. Burche and Catherine Burche, his wife, and in the occupation of their tenants.

56 9th. That the plaintiff fully paid her proportion, an equal one-half, of the interest that accrued on the said indebtedness to the said Rebecca R. Mellen up to and including the instal-

ment due and payable for the quarter ending the 15th day of Oct., A. D. 1873, but that the defendant, Catharine Burche, nor any one for her, ever paid any portion of said interest that accrued after the 15th day of January, A. D. 1873, though she could easily have done so had she so desired.

10th. That upon the death of the said Susan Hewitt the plaintiff sought to ascertain from the defendant, Catharine Burche, what were her wishes, and to have an agreement entered into by and between them in regard to the disposition that should be made of said property for their respective benefit, but that she, the said Catharine Burche, not objecting to the plaintiff's further continuing in the occupancy of the same, was not prepared to determine what was best to be done, so that nothing definite was agreed upon by and between them.

57 That in consequence of the said Catharine Burche's failure to pay her portion of the interest as the same fell due on and after the said 15th day of January, A. D. 1873, the plaintiff, who had no interest in any other real estate, and no other home for herself and her children, and earnestly and naturally desired to avoid the loss of that of which she was then in the enjoyment, submitted several propositions to the said Catharine Burche for a purchase or leasing of her interest in said property, to none of which did she accede, and another in regard to the sale of the entire property, the only response to which that was made by the said Catharine Burche was the expression of her unwillingness to have it sold at a less price than thirty thousand dollars, but without advice to the plaintiff as to the manner and terms upon which it was desired to have a sale made. That afterwards, in May, A. D. 1873, the defendant, Catharine Burche, gave notice to the public that said property was for sale, which was done by her causing to be affixed

58 to the same in a conspicious place a placard by which the public were advised that such property was offered for sale, and that to ascertain the terms of the sale so advertised they should inquire "within," meaning thereby that they should make inqury of some one in the occupation of said property.

That the said notice of sale was given without the plaintiff's knowledge or consent, nor was she, or any *or any* one for her, ever advised by the said Catharine Burche, or by any one for her, as to the terms or manner upon and in which she desired said property to be sold; so that no other or more satisfactory answer could be given to those who made inquiries in regard to such advertised sale than that the property was valued at thirty thousand dollars, and consequently the said advertisement only resulted in preventing the plaintiff from renting the unoccupied portions of said property, although the same were kept duly advertised for rent, and would have been rented upon advantageous terms but for said advertisement, which deterred those who were in search of rooms and made inquiries therefor from entering into the occupancy of the same.

59 11. That afterwards the plaintiff and defendant, Catharine Burche, by a stipulation in writing entered into by and be-

tween them, agreed to refer all matters in dispute between them to arbitration, and that the arbitrators selected to act under that agreement thereafter made an award, a copy of which and of said submission is herewith filed, marked Exhibit S. L. W. No. 2 (see pp. 20–26), and is prayed to be taken as part hereof. That in the making of said award the said arbitrators committed a mistake of fact, to the plaintiff's prejudice and injury, by chargeing against her the sum of five hundred and eighty-eight dollars and eighty cents on the assumption that she, whilst in the occupancy of said property in the life-time of the said Susan Hewitt, had suffered taxes to that amount to fall in arrear and be charged up against said property, and that she was alone responsible for the payment thereof, whereas in truth and in fact, as abundantly appeared in proof before them, only the sum of three hundred and forty-eight dollars and nine cents was so in arrear and unpaid, and the plaintiff was properly charge-
60 able with the payment of one-half only of the last-mentioned amount of taxes so in arrear. That the said arbitrators also committed grave error of law, to the plaintiff's great prejudice and injury, in adjudging her liable to the defendant, Catharine Burche, upon an undertaking in reference to the care and maintenance of the said Susan Hewitt in her life-time and the plaintiff's occupation of said property for that purpose, that rested in parole and was as between the plaintiff and the said Catharine Burche a mere *nudum pactum*, and that for these and other manifest errors of law and fact, and because of the subsequent acts and doings of the defendant, Catharine Burche, in the premises, the said award should be vacated and set asided.

12th. That the defendant, Catharine Burche, was dissatisfied with the said award, because the extravagant demands that she had made of the plaintiff had not been fully allowed in her favor, and, unwilling to have the same carried into execution, would do nothing to bring about a private sale of said property at and for
61 a fair and reasonable price, as was intended and provided for by the said arbitrators. On the contrary, being well advised as to the plaintiff's straitened circumstances, caused in a very great measure by her action in placarding the property for sale as hereinbefore stated, she, the said Catherine Burche, sought to impose more onerous terms upon the plaintiff as a condition for the making of such private sale than had been prescribed by the said arbitrators, wilfully continued to estimate the value of said property at a much higher price than she knew it would bring at either a private or forced public sale, and utterly neglected and refused to pay her just proportion of the interest that accrued on said indebtedness from and after the said 15th day of January, A. D. 1873, craftily intending thereby and upon a private arrangement entered into with the defendant, Rebecca R. Mellen, to bring about a sale under the provisions of the deed, whereby the said property was conveyed to the defendant, Kennedy, in trust as aforesaid, so that she, taking advantage of her own default, and
62 of such arrangment with the defendant, Rebecca R. Mellen,

could become at such forced sale the purchaser of the plaintiff's interest in said property at a sacrifice.

13th. That in furtherance of this design on the part of the defendant, Catherince Burche, the defendant, Kennedy, acting under the directions of the defendant, Rebecca R. Mellen, on the 29th day of November, A. D. 1873, advertised said property for sale at public auction, on the 8th day of December next thereafter, a copy of which advertisement is herewith filed, marked "Exhibit B," (see pp. 44, 45,) and prayed to be taken as part hereof.

14th. That such advertisement being made, the defendants combined together to enable the defendant, Catherine Burche, to purchase the said property on other and different terms than those offered by said advertisement to bidders at such proposed sale, and thereby to defraud the plaintiff out of her interest therein; and afterwards, on the 8th day of December, A. D. 1873, in pursuance of such fraudulent intention, the defendant, Kennedy, offered
63 the said property, with all the large and valuable improvements thereon, for sale by the square foot, and pretended to sell the same to the defendant, Catharine Burche, through her duly authorized agent, at and for the price of two dollars and fifty-eight cents per square foot.

14th. That the defendant, Kennedy, trustee, did not use due discretion in advertising and attempting a sale of said property, and committed grave errors, to the great wrong and injury of the plaintiff, in advertising and attempting a sale at a time when there was great stringency and distress in the money market, and a general depression in business, in selling in a most unusual manner, by the square foot, highly improved property, without having previously given notice that the property would be so sold, and the number of square feet in said property, in advertising that a sale would be made pursuant to a deed recorded in liber 687, folio 463, when the deed in which the plaintiff had joined was recorded in liber 667, folio 463, of the land records of the District of Columbia,
64 and that the purchaser at such proposed sale would be required to pay, in cash, five thousand dollars, with interest at the rate of ten per centum per annum from January 15th, A. D. 1873, when in fact one-half of such interest had been paid by the plaintiff, and so absolutely prevented fair competition for said property at said pretended sale.

15th. That a great wrong and injury was done to the plaintiff by the defendant Kennedy in making the said erroneous advertisement as to the book in which said deed of trust to himself was recorded, in this, that the public were deprived of information which should have been furnished, and which the interests of the plaintiff required absolutely should have been correctly given, in order to enable those who desired to bid at such sale to examine into the validity of the conveyance of said property to the defendant Kennedy in trust, as aforesaid, and to satisfy themselves as to the regularity of his proceedings in the premises, and be thereby encouraged to compete at said sale for said property, and in giving notice that a

65 larger amount of cash would be required to be paid than the defendant, Rebecca R. Mellen, was entitled to receive, aggravated by making the demand at a time of great financial distress, and which resulted in the said property being struck off to the agent of the defendant Catharine Burche at a grossly inadequate price.

16th. That in the further prosecution of the defendant's said wrongful combination the defendant Kennedy, on the 15th day of December, A. D. 1873, executed and delivered to the defendant Catherine Burch his deed of conveyance for said property, which was duly recorded on the 24th of the same month in liber 740, folio 122 of the land records of said District, and on the same 24th day of December the defendant Catherine Burche conveyed the said property by her deed of that date to the defendant Rebecca R. Mellen in trust to secure the payment of a pretended indebtedness of eight thousand two hundred dollars alleged to be due from the said Catherine Burche to the defendant Elizabeth Hain, and payable in five

66 years thereafter, with interest at the rate of ten per centum per annum payable quarterly, the principal of said indebtedness being evidenced by the promissory note of the said Catherine Burche to the said Elizabeth Hain of even date with the said deed of trust to the defendant Rebecca R. Mellen for the sum of eight thousand two hundred dollars, payable five years from its date, and the several instalments of said interest by twenty other promissory notes of the said Catherine Burche to the said Elizabeth Hain, of even date with the said deed of trust, and each for the sum of two hundred and five dollars, all which will more fully and at large appear by reference to said deed of trust, which was duly recorded on the said 24th day of December, A. D. 1873, in liber 740, folio of the land records of said district, and is with the deed from the defendant Kennedy to the said Catherine Burche prayed to be taken as part hereof.

67 *Deed to Catharine Burche.*

Recorded December 24th, 1873, 2.45 p. m.

JOS. C. G. KENNEDY *to* CATHARINE BURCHE. } Deed.

This indenture, made on the fifteenth day of December, in the year of our Lord one thousand eight hundred and seventy-three, between Joseph C. G. Kennedy, of the city of Washington, in the District of Columbia, trustee, party of the first part, and Catharine Burche, the wife of Raymond W. Burche, of Montgomery county, in the State of Maryland, party of the second part, witnesseth:

Whereas Charles S. Wallach and Lavinia, his wife, and Raymond W. Burche and the said Catharine Burche, his wife, by their deed of indenture bearing date on the fifteenth day of January, in the year eighteen hundred and seventy-two, and duly recorded in liber No. 667, folio 463, *et seq.*, one of the land records in and for Washington county, in said District, did grant and convey to the said

Joseph C. G. Kennedy, in trust, the hereinafter described premises to secure the payment of a certain promissory note, and
68 interest thereon quarterly, as in said trust fully set forth. And whereas default having been made in the payment of three (3) of said quarterly interest payments, the said Joseph C. G. Kennedy therefore, and at the written request of Rebecca R. Mellen, the beneficiary named in said trust and legal holder of said note, and in evidence of such written request she signs and seals these presents, did, on the twenty-seventh day of November, A. D. 1873, according to the provisions of said trust, advertise the said hereinafter described premises in the National Republican, a daily newspaper printed and published in said city, to be sold at public auction by Kelly and Gatchel, auctioneers, on the eighth day of December, 1873, at the hour of four o'clock p. m., on the premises, at which public sale the said party hereto of the second part, by her authorized agent, bid the sum of two dollars and fifty-seven and one-half cents ($2.57\frac{1}{2}$) for each square foot of ground in said hereinafter described property, making in the aggregate the sum of
69 sixteen thousand five hundred and nine dollars and sixty-six cents ($16,509.\frac{66}{100}$), which bid being the highest then and there made, the said property was therefore sold to her and in her name for said amount. And whereas the said party hereto of the second part has since said day of sale fully complied with the terms thereof, the said trustee, party hereto of the first part, doth execute these presents. Now, therefore, this indenture witnesseth that the said party hereto of the first part, trustee as aforesaid, for and in consideration of the premises, the said sum of sixteen thousand five hundred and nine dollars and sixty-six cents ($16,509.\frac{66}{100}$), and the further sum of one dollar current money of the United States, to him, the said party of the first part, in hand paid by the said party hereto of the second part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, aliened, enfeoffed, conveyed, and confirmed, and by these presents doth grant, bargain and sell,
70 alien, enfeoff, convey, and confirm unto her, the said party hereto of the second part, her heirs and assigns, forever, all that certain piece and pieces or portions of ground in the said city of Washington known and described on the plat books and official records as parts of lot one (1) and two (2), in square four hundred and fifty-seven (457), the same fronting fifty-four $\frac{11}{12}$ feet (54 feet 11 inches) on Sixth street west, and one hundred and sixteen $\frac{9}{12}$ (116 feet 9 nine inches) feet on north D street, together with all and singular the improvements, privileges, hereditaments, and appurtenances to the same belonging, or in any manner appertaining, to have and to hold the same unto and to the use of the said party of the second part, her heirs and assigns, forever, to her and their sole use, benefit, and behoof forever, as though she were a *femme sole* and never married.

In testimony whereof, the said party of the first part, trustee as

aforesaid, hath hereunto set his hand and affixed his seal, the day and year first hereinbefore written.

71 REBECCA R. MELLEN. [SEAL.]
JOS. C. G. KENNEDY, *Trustee.* [SEAL.]

Signed, sealed, and delivered in the presence of—
J. M. KENNEDY.

DISTRICT OF COLUMBIA, } *To wit:*
County of Washington. }

I, J. M. Kennedy, a notary public in and for said county, in said District, do hereby certify that Joseph C. G. Kennedy, trustee, party to a certain deed, bearing date on the fifteenth (15) day of December, in the year of our Lord one thousand eight hundred and seventy-three, and hereto annexed, personally appeared before me, in the county aforesaid, the said Joseph C. G. Kennedy, being personally well known to me to be the person who executed said deed, and acknowledged the same to be his act and deed. Given under my hand and notarial seal, this twenty-fourth day of December, A. D. 1873.

[SEAL.] J. M. KENNEDY,
Notary Public.

72 *Deed of Trust to Rebecca R. Mellen.*

Recorded December 24th, 1873, 2.45 p. m.

CATHARINE BURCHE, } Trust.
to
REBECCA R. MELLEN }

This indenture, made this twenty-fourth day of December, in the year of our Lord one thousand eight hundred and seventy-three, between Catharine Burche, the wife of Raymond W. Burche, of Montgomery county, in the State of Maryland, party of the first part, and Rebecca R. Mellen, of the city of Philadelphia, in the State of Pennsylvania, party of the second part. Whereas the said Catharine Burche stands justly indebted unto Elizabeth Hain, of Dauphin county, in said State of Pennsylvania, in the sum of eight thousand two hundred (8,200) dollars, for which amount the said Elizabeth Hain holds one (1) promissory note, made, signed, and delivered by the said Catharine Burche, bearing even date herewith, and payable to the order of said Elizabeth Hain, at five (5) years after date, with interest at the rate of ten (10) per cent per annum, payable quarterly, until paid, and for which interest the said
73 Catharine Burche, also made and delivered twenty (20 quarterly interest notes, each for the sum of two hundred and five (205) dollars bearing even date herewith, and payable to the order of said Elizabeth Hain quarterly, from and after the date hereof, and date of said note, and being desirous to secure the punctual payment of said notes when and as the same shall respectively

become due and payable, with all interests and costs due and accruing thereon, she therefore executes these presents. Now, therefore, this indenture witnesseth, that said party of the first part, for and in consideration of the premises and the sum of one dollar in lawful money of the United States, to her in hand paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and doth by these presents grant, bargain, sell, alien, enfeoff, release,
74 and convey unto the party of the second part, her heirs, and assigns, the following described real estate, situate in the city of Washington, District of Columbia, to wit: All that certain piece, parcel, or parts of lots of ground known and described on the ground plat or plan of said city of Washington as part of original lots numbered one (1) and two (2), in square numbered four hundred and fifty-seven (457), the same fronting fifty-four $\frac{11}{12}$ feet (54 feet 11 inches) on Sixth street west, and running back with an even width by and with the north line of north D street one hundred and sixteen $\frac{9}{12}$ feet (116 feet 9 inches), together with all the improvements, ways, easements, rights, privileges, appurtenances, and hereditaments to the same belonging, or in anywise appertaining, and all the estate, right, title, interest, and claim whatsoever, either at law or in equity, of the said party of the first part of, in, and to the said — or parcel of land and premises, to have and to hold the said piece or parcel of land, and premises with the appurtenances unto
75 and to the use of the said party of the second part, her heirs and assigns, in and upon the trusts nevertheless hereinafter mentioned and declared, and none other, that is to say, in trust to permit the said party of the first part, her heirs or assigns, to use and occupy the said described premises, and the rents, issues, and profits thereof to take, have, and apply to and for her and their sole use and benefit until default be made in the payment of said note or any instalment of interest due thereon, or any proper cost, charge, commission, half commission, or expense in and about the same. And upon the full payment of all of said note, and the interest thereon, and all other proper costs, charges, commissions, half commissions, and expenses at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said party of the first part, her heirs or assigns, at her or their cost. And upon this further trust, that upon default being made in the payment of the said note or any instalment of
76 interest due thereon, or any proper cost, charge, commission, half commission, or expense in and about the same, then and at any time thereafter to sell the said piece or parcel of land and premises at public auction in front of the premises, after at least ten (10) days notice of the time, place, and terms of sale by advertisement in some one or more of the newspapers printed and published in the said city of Washington, which said terms of sale shall be as follows, viz., the amount of indebtedness secured by this deed of trust unpaid, with the expense of sale in cash, and the balance at twelve and twenty-four months, for which the notes of the

purchaser bearing interest from the day of sale and secured by a deed of trust on the property sold shall be taken. A deposit of three hundred ($300) dollars shall be required of the purchaser at the time of sale, and all conveyancing and revenue stamps shall be at the expense of the purchaser. And upon this further trust upon full compliance with the terms of
77 sale to convey the property sold in fee simple to the purchaser or purchasers thereof at his, her, or their cost and expense and without any liability to see to the application of the purchase money, and out of the proceeds of said sale or sales, first, to pay all proper costs, charges, and expenses, and to retain, as compensation, a commission of three per cent on the amount of said sale or sales. Secondly, to pay whatever may then remain unpaid of the said note and the interest thereon, whether the same shall be due or not, and lastly to pay the remainder, if any, to said party of the first part, her heirs or assigns. And the said party of the first doth hereby covenant with the said party of the second part, her heirs and assigs, that all taxes upon the said land shall be duly paid, and that the building on said parcel of land shall be kept insured during the continuance of this trust, in some good and responsible fire insurance company or companies, to the satisfaction of
78 the party of the second part, in the sum of two thousand (2,000) dollars for the benefit of the debt hereinbefore described, and the policy or policies of insurance be assigned to the said party of the second part as trustee under these presents, and further that in case the said party of the first part, her heirs or assigns, shall fail to pay taxes or to keep said property so insured, then the taxes may be paid and the property be insured for the amount aforesaid by the legal holder of the note before mentioned, and the amount of taxes and premuims paid shall be considered a part of the expense of said note secured hereby; in default of payment of which the said party of the second part shall have power to sell said property hereby conveyed as aforesaid, and shall dispose of the proceeds of sale as hereinbefore provided. And it is further agreed that if the property shall be advertised for sale under the provisions of the deed and not sold, then the said trustees shall be entitled to one half the commission above provided, to be computed on
79 the amount of the debt hereby secured.

In testimony whereof, the said party of the first part have hereunto set her hand and seal on the day and year first hereinbefore written.

CATHARINE BURCHE. [L. S.]

Signed, sealed, and delivered in the presence of—
JOS. F. KELLY.
A. F. FOX.

DISTRICT OF COLUMBIA, } ss:
County of Washington, }

I, Joseph F. Kelly, a notary public in and for the county afore-

said, do hereby certify that Catharine Burche, party to a certain deed bearing date on the twenty-fourth day of December, A. D. 1873, and hereto annexed, personally appeared before me, in the county aforesaid, the said Catharine Burche, being personally known to me to be the person who executed the said deed, and acknowledged the same to be her act and deed. Given under my hand and notarial seal this 24th day of December, A. D. 1873.

[SEAL.] JOS. F. KELLY, *Notary Public.*

17th. That the said deed of trust was taken by the defendant, Mellen, though she knew all the circumstances aforesaid, and the plaintiff verily believes, and so charges, that the said notes are held by her.

80 18. That afterwards, on the 7th day of January, A. D. 1874, there was recorded in liber 741, folio 251, of the land records of said District, a deed of conveyance bearing date the said 24th day of December, 1873, executed by the defendant, Catharine Burche, to Anthony Hyde and Albert F. Fox, by which she conveyed to them the said property in trust to secure the payment of the sum of four thousand four hundred and eighty dollars and sixty cents to the defendant, Kennedy, trustee, which sum of money would be due and payable to the plaintiff as her portion of the money realized at the sale so attempted to be made by the defendant, Kennedy, as heretofore stated, were the same a valid sale; which said indebtedness was evidenced by the two promissory notes of the defendant, Catharine Burche, bearing date the said 24th day of December, A. D. 1873, and each for the sum of two thousand two hundred and four dollars and thirty cents, payable respectively one and two years after their date, with interest at the rate of ten per centum per annum, as will more fully appear by reference to the said deed, which is prayed to be taken as part hereof.

81 *Deed of Trust to Hyde & Fox.*

Recorded January 7, 1874, 2 p. m.

CATHARINE BURCHE *to* HYDE & FOX } Trust.

This indenture made this twenty-fourth day of December, in the year of our Lord one thousand eight hundred and seventy-three, between Catharine Burche, the wife of Raymond W. Burche, of Montgomery county, in the State of Maryland, party of the first part, and Anthony Hyde and Albert F. Fox, of the District of Columbia, parties of the second part. Whereas the said Catharine Burche stands justly indebted to Joseph C. G. Kennedy, trustee, in the sum of four thousand four hundred and eight dollars and sixty cents, for which amount the said Joseph C. G. Kennedy holds two (2) promissory notes, made, signed, and delivered by the said Catharine Burche, each for the sum of twenty-two hundred and four dollars and thirty cents, bearing even date herewith and payable to

the order of said Joseph C. G. Kennedy, at one (1) and two (2) years after date, with interest at the rate of eight per cent.
82 per annum until paid. And being desirous to secure the payment of said notes and interest, do execute these presents. Now, therefore, this indenture witnesseth that the said party of the first part, for and in consideration of the premises aforesaid, and further the sum of one dollar in lawful money of the United States to her in hand paid by the said parties of the second part at and before the sealing and delivery of these presents, the receipt wherof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and doth by these presents, grant, bargain, sell, alien, enfeoff, release, and convey unto the said parties of the second part, the survivor of them, his heirs and assigns forever.

All that certain piece, parcel or parcels of lots of ground known and described on the ground plat or plan of said city of Washington, as part of original lots numbered one (1) and two (2), in square numbered four hundred and fifty-seven (457), the same fronting fifty-four $\frac{11}{12}$ feet (54 feet 11 inches) on Sixth street west, and run-
83 ning back with an even width by and with the north line of north D street, one hundred and sixteen $\frac{3}{12}$ ft. (116 feet 9 inches).

Together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise however, of the said party of the first part of, in, to, or out of the said described real estate and premises. To have and to hold the said described real estate and premises, with the appurtenances, unto and to the use of the said parties of the second part, the survivor of them, his heirs and assigns. In and upon the trust nevertheless hereinafter mentioned and declared, that is, in trust to permit the said party of the first part, his heirs or assigns, to use and occupy the said described premises, and the rents, issues, and profits thereof, to take, have, and ayply to and for her and their sole use and benefit, until de-
84 fault be made in the payment of said notes, or any proper cost, charge, commission, half-commission, or expense in and about the same. And upon the full payment of all of said notes and the interest thereon, and all other proper costs, charges, commissions, half-commissions, or expenses, at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said party of the first part, her heirs or assigns, at her or their cost. And upon this further trust, that upon default being made in the payment of the said notes and interest thereon, and any proper cost, charge, commission, half-commission, or expense in and about the same, then and at any time thereafter, to sell the said described real estate and premises at public auction, upon such terms and conditions, and at such time and place, and after such previous public advertisement as the said parties of the second part, the survivor of them, his heirs or the trustee acting in the execution of this trust, shall deem advantageous and

proper; and to convey the same in fee simple to and
85 at the cost of the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase money, and of the proceeds of said sale or sales, first, to pay all proper costs, charges, and expenses, and to retain as compensation a commission of three per cent. on the amount of said sale or sales; secondly, to pay whatever may then remain unpaid of the said notes and the interest thereon, whether the same shall be due or not; and, lastly, to pay the remainder, if any, to said party of the first part, her executors, administrators, or assigns.

In testimony whereof, the said party of the first part hath hereunto set her hand and seal on the day and year first hereinbefore written.

CATHARINE BURCHE. [SEAL.]

Signed, sealed, and delivered in the presence of—
JOS. F. KELLY,
W. A. BOSS.

86 DISTRICT OF COLUMBIA, } *ss:*
County of Washington, }

I, Joseph F. Kelly, a notary public in and for the District aforesaid in said county, do hereby certify that Catharine Burche, party to a certain deed bearing date on the twenty-fourth day of December, A. D. 1873, and hereto annexed, personally appeared before me, in said county, the said Catharine Burche, being personally well kuown to me to be the person who executed the said deed, and acknowledged the same to be her act and deed.

Given under my hand and my notarial seal, this thirty-first day of December, A. D. 1873.

[SEAL.] JOS. F. KELLY, *Notary Public.*

87 19th. And this defendant, Catharine Burche, falsely pretending that she has paid off taxes on the said property that ought to have been paid by the plaintiff, and setting up claims under the said award which she had completely violated and set aside, has filed in this honorable court her bill against the plaintiff, and is thereby seeking to reach the plaintiff's interest in the deferred payments of the purchase money for said property realized at said pretended sale for the satisfaction of said false and fraudulent claims; and whereas the plaintiff cannot have complete remedy under the said bill, she brings this her cross-bill.

And the plaintiff humbly prays:

1st. That the defendants hereto may be required to answer the several matters herein set forth the same as if they and each of them were thereto specifically interrogated.

2d. That an account may be taken under the order of this honorable court of the rents and profits of the said real estate,
88 and of all other matters between the plaintiff and the defendants and each of them.

3d. That the said award may be set aside and held for naught.

4th. That the said pretended sale may be set aside, and the said deed of Kennedy to defendant Catharine Burche may be directed to be delivered up and cancelled.

5th. That the said property may be sold under the directions of this honorable court, and some fit and proper person be appointed trustee to make such sale.

6th. That a receiver may be appointed to take charge of the said property, and to collect the rents thereof during the pendency of this suit, and to apply the same to the payment of the taxes, insurance, and repairs thereon as the exigency of said property may require.

7th. That the plaintiff may have such other and further relief as she is entitled to, and the nature of the case requires.

THOS. JESUP MILLER,
LUTHER H. PIKE,
Pl'tffs Sol'rs.

89 *Subpœna to Ans. Cross-Bill*

In the Supreme Court of the District of Columbia, December 1st, 1874.

CATHARINE BURCHE, Complainant, *against* S. LAVINIA WALLACH *et al.*, Defendants. } No. 3571. Equity Docket, 13.

The President of the United States to J. C. G. Kennedy, Raymond W. Burche and wife, Catharine Burche, Elizabeth Hain, and Rebecca R. Mellen, defendants.

You are hereby commanded to appear in this court at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the cross-bill, under pain of attachment, and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk, &c.*
By R. J. MEIGS, JR., *Ass't Clerk.*

Return of Marshal

Marshal's fees not paid Feb. 18, 1875.

ALEX. SHARP, *Marshal.*

90 *Demurrer to Cross-Bill.*

In the Supreme Court of the District of Columbia, sitting in Equity.

RAYMOND W. BURCHE and CATHARINE BURCHE, his wife, *vs.* S. LAVINIA WALLACH. } No. 3571. Eq. Doc., 13.

The said Raymond W. Burche and Catharine Burche, his wife,

hereby demur to the cross-bill filed in this cause by the said S. Lavinia Wallach, and for cause of demurrer say and show:

1. That the main object of said cross-bill is to introduce new parties into this cause, who are in no wise interested in or can be affected by any decree which may be made in said original cause.

2. That the principal matter set out and contained in said cross-bill are in no wise new, but are counter statements to the matters set up in said original bill and proper for an answer thereto.

91 3. That as to any pretended discovery sought by said cross-bill of any facts within the knowledge of these demurrants, they say full answers could be obtained thereto by calling them as witnesses under the statute, and thus the cumbrous and expensive machinery of a cross-bill might be avoided.

Wherefore they pray judgement of this court whether they should make any answer to the said cross-bill, and that the same be dismissed with costs.

JOS. H. BRADLEY,
Sol'r for R. W. and Catharine Burche.

Jos. H. Bradley, of counsel for the said Raymond W. Burche and Catharine Burche, certifies hereby that the foregoing demurrer is in his opinion well founded in law.

JOS. H. BRADLEY.

Raymond W. Burche, one of the defendants named in said cross-bill, to which the foregoing demurrer is interposed, makes oath according to law that it is not interposed for delay.

R. W. BURCHE.

Subscribed & sworn to before me this 20th day of Jan'y, 1875.
R. J. MEIGS, *Clerk.*
By L. P. WILLIAMS, *Ass'. Clerk.*

92 *Replication to Answer of S L Wallach.*

In the Supreme Court of the District of Columbia, sitting in Equity.

CATHARINE BURCHE
vs.
L. LAVINIA WALLACH & others. } No. 3571. Eq. Doc. 13.

The complainant hereby joins issue with the defendant, S. Lavinia Wallach, and will hear the cause on bill, answers, replication, and proofs hereafter to be taken.

JOS. H. BRADLEY,
Sol'r for Compl't.

Order to take Proof.

It is this 28th day of February, 1876, on motion of J. H. Bradley, sol'r for C. Burche, ordered that said Catharine Burche be allowed

till the 1st day of April next, inclusive, within which to take her testimony in the above causes.

By the court. A. WYLIE, *Justice.*

93 *Motion to Enlarge Time for Taking Testimony.*

In the Supreme Court of the District of Columbia, sitting in Equity.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH and others. } No. 3571. Eq. Doc. 13.

In this cause the complainant prays leave to move, and does hereby this honorable court, to enlarge the time for taking depositions therein and for cause shows:

That by reason of the protracted sickness of Mrs. Valinda Wiltberger, she was unable to take her testimony in said cause until Thursday, the 30th March, last; and by reasan of the absence from the city of Washington of Mrs. Rebecca R. Mellen and Mr. Dustin F. Mellen, and her inability to obtain their testimony in time, whose testimony is most material and competent and proper for her in said cause, and which she feels confident can be obtained within the next thirty days, and without which she cannot safely go to the trial of the said cause.

Wherefore she prays the said time for taking the said
94 testimony may be enlarged for thirty days.

JOS. H. BRADLEY,
Sol'r for Compl't.

4th April, 1876.

Order.

And thereupon by order of the court, made this 5th day of April, 1876, the time for the plaintiffs taking her testimony is hereby enlarged to thirty days from this day.

By the court, A. W.

95 *Deposition of Dustin F. Mellen.*

In the Supreme Court of the District of Columbia, the 12th day of March, 1877.

CATHERINE BURCHE
vs.
S. LAVINIA WALLACH, } 3571. Eq. Doc. 13.

and

S. LAVINIA WALLACH
vs.
CATHARINE BURCHE *et al.* } 4423. Eq. Doc. 13.

The President of the United States to S. P. Auchmuty, of Millersberg, Pa., Greeting:

Know ye, that in confidence of your prudence and fidelity, you

have been appointed and by these presents you are invested with power and authority to examine Dustin F. Mellen as a witness for the complainant Burche in the above-entitled cause, upon the interrogatories and cross interrogatories annexed to this commission; and, therefore, you are hereby commanded, at a certain day and place, or certain days and places to be appointed by you, to
96 cause said witness to come before you, and then and there examine him, on oath or affirmation, upon the said interrogatories, and reduce his testimony into writing, to be signed by said witness; and, having so done, annex the same to this writ, closed up under your seals, and make return thereof into said court with all convenient speed.

Witness D. K. Cartter, Chief Justice.

[SEAL.] R. J. MEIGS, *Clerk.*
By L. P. WILLIAMS, *Ass't Clerk.*

97 *Interrogatories to D. F. Mellen. Filed Feb.* 24, '77.

In the Supreme Court of the District of Columbia, holding a Term in Equity.

CATHARINE BURCHE *vs.* S. LAVINIA WALLACH. } No. 3571. Eq. Doc. 13.

and

S. LAVINIA WALLACH *vs.* CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

Interrogatories on the part of Catharine Burche, complainant, in the first and defendant in the other of the above-entitled causes, to be propounded to Dustin F. Mellen, a witness heretofore examined in the said cause and now called in rebuttal.

1. In your original examination-in-chief (see pp. 274–298) you testify as follows: "Two years ago last November I came to Washington in order to make a settlement and have the interest paid quarterly, as it was named in the deed; if not, I should be obliged to sell the property. There was a difference between the two ladies; one that I always objected to knowing anything
98 about. They both wanted to purchase, and in case either should purchase I agreed that the loan should be renewed. Then I made this proposition to Mrs. Wallach (on the occasion of my visit spoken of above) at the two separate times that, whichever should buy the mortgage, our trust must be the first on the property. If Mrs. Wallach should buy it should be first, or if she, Mrs. Burche, should buy, it should be first. The second time I called on Mrs. Wallach, Mrs. Wallach told me that it would require, if she bought that, an additional sum be added to the $5,000, sufficient to pay the taxes and assessments. I agreed to loan so much more as would pay all, which she said would be about $700. I had pretty much the same conversation with Mrs. Burche, and made her the same offer; it didn't make any difference which of them

should buy the property. I saw them only separately, and not together, but I communicated the substance of the conversation of each on the subject to the other. Both consented to the proposition that I made as above. The money couldn't be had on any other terms."

99 Now, please to state whether, at either of these interviews, or at any other time, Mrs. Wallach or her son Richard L. Wallach, or any other person in your hearing, objected to the propositions which you say were made by you to and accepted by Mrs. Wallach, with the knowledge that you had made the same propositions to Mrs. Burche, and did she, or any one else in your hearing, say she could not accept them, "because she could not raise money enough to pay off Mrs. Burche's interest, and so give Mrs. Mellen the first mortgage which he" (you) "required, and of course Mrs. Burche would not take the second," and were any words to that effect uttered by any one?

2. Was or was not Mrs. Wallach distinctly informed by you that you had made the same propositions to Mrs. Burche, and that she had accepted them, and did she or not enter into the said agreement with you with that distinct understanding and knowledge, and that you would do no more for one of them than for the other?

3. Did you or not clearly and distinctly inform Mrs. Wal-
100 lach that the propositions you made to her could not be carried out if accepted by her other sister alone, but that they must both agree to it or it could not be done?

4. State if you please if you know whether Mrs. Wallach did or did not request some one to bid for her at that trust sale? And if yea, and you know the name of the person of whom she made such request, give the name.

6. Do you recollect Richard L. Wallach, son of Mrs. Wallach, and whether you saw him at that sale, and whether you had any conversation with him at that time, and whether he said anything in regard to your bid? State as well as you can recollect what he did say.

6. State any other matter or thing within your recollection tending to show whether Mrs. Wallach did accept the proposition you made to her as detailed in your testimony and not already testified to by you.

JOS. H. BRADLDY,
Sol'r for Cath. Burche.

101 *Cross-Interrogatories to D. F. Mellen. Filed Mar* 8, '77.

In the Supreme Court of the District of Columbia. In Equity.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH, } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BUCHE. } No. 4423. Eq. Doc. 15.

Cross-interrogatories on the part of Susan L. Wallach, defend-

ant in the first and complainant in the second of the above-entitled causes, to be propounded to Dustin F. Mellen, a witness in rebuttal, on behalf of said Catharine Burche.

1. Was your proportion to Mrs. Wallach that if she agreed with you to become the purchaser, that Mrs. Burche's consent would have to be secured before the agreement could be carried out?

2. Who was to secure Mrs. Burche's consent?

3. Who did see her?

102 4. How was her consent secured, as you assert it was?

5. Was Mrs. Wallach informed that Mrs. Burche had agreed that she, Mrs. Wallach, might carry out the proposition you had made to her; if yea, by whom, how, when, and where was she so informed, and if any person or persons were then present, give the name or names of such person or persons?

6. How long was it before the sale that Mrs. Wallach, as you assert, agreed to your proposition?

7. Was your proposition to Mrs. Burche, that if she agreed with you to become the purchaser, that Mrs. Wallach's consent would have to be secured before the agreement could be carried out?

8. Who was to secure Mrs. Wallach's consent?

9. Who did see her?

10. How was her consent secured, as you assert it was?

103 11. Was Mrs. Burche informed that Mrs. Wallach had agreed that she, Mrs. Burche, might carry out the proposition you had made to her? If yea, by whom, how, when, and where was she so informed, and if any person or persons were then present, give the name or names of such person or persons.

12. How long before the sale was it that Mrs. Burche, as you assert, agreed to your proposition?

13. Did you make your proposition to Mrs. Wallach before you made it to Mrs. Burche?

14. Who first accepted your proposition, Mrs. Wallach or Mrs. Burche?

15. Who first gave consent to the other's accepting and carrying out your proposition, Mrs. Wallach or Mrs. Burche?

16. If the proposition was first made to Mrs. Wallach and first accepted by her, and Mrs. Burche first gave her consent to that agreement, why was it not carried out?

104 17. Why was the agreement carried out with Mrs. Burche and not with Mrs. Wallach?

18. Was any person other than yourself and Mrs. Wallach present at one or all of the interviews had with you? If yea, give the name or names of such persons or persons.

19. Did such person or persons at either or all of such interviews make any remark whatever, either to you or to Mrs. Wallach, or to both of you, in regard to the proposition you made to her, or in regard to Mrs. Burche's consent to her accepting it? If yea, state as nearly as you can what such remark or remarks were.

20. How, when, or where, or by what means, have you ever known that Mrs. Wallach requested any one to bid for her at the sale?

21. Did you have any conversation with Richard L. Wallach in

reference to the proposal that Mrs. Wallach should purchase? If yea, state when and where and who else was present.

22. Was Richard Wallach present at any interview you had
105 with Richard L. Wallach? If yea, did Richard L. Wallach on that or on any other occasion inform you that his mother could not in law become the purchaser unless enough money was advanced to pay for Mrs. Burche's moiety of the property in addition to the amount of Mrs. Mellen's incumbrance?

L. H. PIKE,
TH. JESUP MILLER,
Sol'rs for Mrs. Wallach.

Deposition of D. F. Mellen.

Deposition of Dustin F. Mellen, a witness produced, affirmed, and examined on the twenty-first day of March, A. D. one thousand eight hundred and seventy-seven, at the office of S. P. Auchmuty, the commissioner, in the borough of Millersburg, county of Dauphin and State of Pennsylvania, by virtue of a commission issuing out of the supreme court of the District of Columbia, United States of America, to the said S. P. Auchmuty, directed for the examination of said Dustin F. Mellen in a certain cause depending in said court, wherein Catherine Burche is plaintiff and S. Lavinia Wallach is defendant, No. 3571 in equity, and S. Lavinia
106 Wallach is plaintiff and Catharine Burche *et al.* are defendants in No. 4423 in equity in said court, said witness being for the complainant Burche in the said cause. Dustin F. Mellen, of Halifax township, county of Dauphin, State of Pennsylvania, gentleman, being produced, affirmed, and examined in behalf of Catherine Burche, complainant in the first and defendant in the other of said above entitled causes, deposeth as follows:

1st. To the first interrogatory on the part of said complainant he answers as follows: There was nothing said by Mrs. Wallach to that effect at that time or any other.

2d. To the second interrogatory on the part of said complainant, he answers as follows: Mrs. Wallach was distinctly informed that I had made the same propositions to Mrs. Burche, and that I would not entertain any other, and Mrs. Wallach entered into the agreement with me with that distinct understanding.

3d. To the third interrogatory on the part of said complainant, he answers as follows: I did.

107 4th. To the fourth interrogatory on the part of said complainant he answers as follows: She, Mrs. Wallach, did herself, also her son, Richard, made such request, before and on the day of sale, that I should bid the property off for her, Mrs. Wallach, but I declined before and at the day of sale to do so.

5th. To the fifth interrogatory, on the part of said complainant, he answers as follows: I recollect Richard L. Wallach, and that he was present at the sale; I saw him there and heard him make a number of bids; I had some conversation with him at the sale, and he blamed me, and seemed vexed at me for not buying for his mother.

6th. To the sixth interrogatory on the part of said complainant, he answers as follows: I have nothing further to say than what I have already answered.

Cross-interrogatories:

108 To the first cross-interrogatory on the part of Susan L. Wallach, he answers as follows: There was no proposition made by me to Mrs. Wallach that was not made as well to Mrs. Burche; they were both the same.

To the second cross-interrogatory he answers as follows: I don't know; all the interest I had was to secure the debt, no matter who purchased; the terms to either would be the same.

To the third cross-interrogatory he answers: Before the sale, both consented to me verbally to the terms of the propositions, whichever should purchase; I have no further memory upon the subject.

To the fourth cross-interrogatory he answers: Her consent was not secured; I had her promise to allow the first mortgage; this was before the sale.

To the fifth cross-interrogatory he answers: I informed Mrs. Wallach, at her house, before the sale, that she, Mrs. Burche, agreed to give the first mortgage to Mrs. Mellen, and Mrs. Wallach
109 also consented thereto; I don't remember of any other persons being present.

To the six cross-interrogatory he answers: Probably a week or ten days before.

To the seventh cross-interrogatory he answers: Mrs. Burche did not agree with me to become the purchaser.

To the eighth cross-interrogatory he answers: I had it before the sale.

To the ninth cross-interrogatory he answers: I don't know.

To the 10th cross-interrogatory he answers: I had her verbal consent before the sale, as I have already stated; I had not secured it other than her promise.

To the eleventh cross-interrogatory he answers: Before the sale Mrs. Burche was informed that Mrs. Wallach had agreed to give the first mortgage to Mrs. Mellen; I so informed her; I don't
110 remember that any other persons were present, and don't remember at what place or rather where I met Mrs. Burche when the information was given.

To the twelfth cross-interrogatory he answers: I don't now remember just how long.

To the thirteenth cross-interrogatory he answers: I don't remember which, but I think to Mrs. Wallach first.

To the fourteenth cross-interrogatory he answers: Mrs. Wallach.

To the fifteenth cross-interrogatory he answers: There was no consent given by either to the others accepting the propositions to my knowledge.

To the sixteenth cross-interrogatory he answers: As stated in my answer to the fifteenth cross-interrogatory, no consent was given by either to my knowledge.

To the seventeenth cross-interrogatory he answers: Mrs. Burche

became the purchaser, and by reason thereof she complied with the terms as proposed. The same would have been the case had Mrs. Wallach purchased.

111 To the eighteenth cross-interrogatory he answers: Mrs. Mellen was present a few times; I don't remember of any others.

To the nineteenth cross-interrogatory he answers: Having already said that I don't remember of any others being present, I therefore cannot know of any remarks being made by others.

To the twentieth cross-interrogatory he answers: She requested me, at her house, before the sale and on the day of the sale.

To the twenty-first cross-interrogatory he answers: I did, at his office, or what I suppose to be his office, about the time of the sale, or within a few days of it; I don't remember whether any other person was present or not.

To the twenty-second cross-interrogatory he answers: I can't say that he was; I don't know Richard Wallach; I don't know

112 of any one being present at the interview with Richard L. Wallach.

D. F. MELLEN.

S. P. AUCHMUTY, *Comm'r.*

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 21st day of March, A. D. 1877.

S. P. AUCHMUTY, *Commissioner.*

113 *Depositions for Mrs. Wallach. Filed Apr.* 25, '77.

In the Supreme Court in the District of Columbia.

BURCHE *vs.* WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and &

WALLACH *vs.* BURCHE *et al.* } No. 4423. Eq. Doc. 15.

DISTRICT OF COLUMBIA, *County of Washington,* } *ss:*

Be it remembered, that at an examination of witnesses begun and held on the 21st day of November, A. D. 1876, and continued from time to time by adjournment, within noted, until the 24th day of April, A. D. 1877, when the within depositions was taken, I, T. D. Anderson, an examiner in chancery, did cause to be personally present at the office of solicitor, T. J. Miller, No. 456 La. Av., in the city of Washington, in said District, the within-named witnesses, to testify in certain causes now depending in the supreme court

114 of the District of Columbia, wherein Mrs. S. L. Wallach in No. 4423 is the complainant, and who is in No. 3571 one of the defendants, and the complainant in No. 3571 is Mrs. Burche, who is the defendant, with others, in No. 4423.

I, T. D. Anderson, examiner in chancery, do hereby certify that in pursuance of notice and agreement of counsel the within depositions were taken down and by me reduced to writing, in the presence of, and from the statement of the witnesses at the time and place designated in the caption thereof, and were then and there by me read over to the witnesses, and by them subscribed in my presence and in the presence of counsel for both parties, who were then and there attending. The witnesses having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause or in any manner interested therein.

T. D. ANDERSON,
Examiner in Chancery.

115 NOV. 15TH, 1876—11 a. m.

Met by agreement of counsel to take testimony for Mrs. S. L. Wallach, a defendant in the first suit, No. 3571, and the complainant in the cross-suit, No. 4423.

Present: Messrs. Miller and Pike.

Adjourned. T. D. ANDERSON, *Ex'r.*

NOV. 21ST, 1876—11 a. m.

Met pursuant to notice.

Present: Mr. Miller, solicitor for Mrs. Wallach, a party to each cause, and Mr. J. H. Bradley, Sr., solicitor for Mrs. Burche, a party on the other side of each cause.

Testimony of Mrs. Wallach.

Whereupon Mrs. S. LAVINIA WALLACH, a witness of lawful age, a resident of Washington, D. C., produced, sworn, and examined by and for the defendant, in case No. 3571, and for the complainant in case No. 4423, deposes and says as follows:

116 I am the defendant in the case No. 3571, and the complainant in case No. 4423, and know the subject-matter in litigation.

Q. State your relationship to Mrs. Hewitt, and the occasion of your assuming charge of her property, and contract in relation thereto.

A. My mother was paralyzed, and when she began to recover, Mrs. Wiltberger, her sister, suggested I should take care of her, to which I objected—I was reduced to poverty by the war; my husband was in a rapid decline; my daughter in a delicate state of health; my son afflicted with a disease that kept me in a constant state of anxiety; house full of boarders, which I was obliged to take to assist in the maintenance of the family; I thought I had all I could stand; but subsequently, when my aunt urged it as my duty, I told her it would be impossible for me to take the charge, unless I received the same board from her that she would have to pay to a

117 stranger. She (my aunt) said "certainly you must take her and

her property—do as she would do herself, and if the property will not take care of her, and pay the taxes, you will have to let the taxes go." This was early in the year 1869. To take this additional charge, I was obliged to give up boarders; sold off all my furniture, except enough for my family; took a small house, with the expectation that my mother's board would pay expenses. Mrs. Hewitt's property at this time (early in 1869) consisted of a life-estate in the house at the corner of 6th & D streets, and her own room furniture. My mother understood perfectly that I was to take the charge, manifested her approval and satisfaction while her reason lasted. The rent which I collected from Crutchett for the two first months she took charge of herself, and made me understand perfectly how she wished them disbursed.

Alter that time, when I would take her the money I collected, it seemed to worry her; she would wave it from her, and made
118 me understand, in the most unmistakable manner, that I must act for her. I felt that I must take care of her to the end, and should have done so had she not had one cent. I took the charge from herself, and not from my aunt, for whom I had every respect and love, but who, I did not think, had a right to make a contract for me. I never talked with Mr. & Mrs. Burche upon the terms upon which I had taken her, but after I had done so I tried to get them to go over my account with me that I might have their approval; but they always declined to do so, and I never received the encouragement I sought.

Q. State the occasion of your taking possession of the property.

A. Mr. Crutchetts was in the house when I made the contract above mentioned, and paid his rent ($100.00 a month) regularly until July, 1870, when he left the house without notice, his
119 lease not being up until the first of September. He left it in a dreadful condition, but through an agent we got a tenant, a Mrs. Broneau, who, I think, went in in October and left it on or before the 1st of February, in arrear for the rent. I am positively certain she was in arrear for one month—January, I think. My condition at this time seemed to have come to a crisis; my daughter died, and we were expecting Mr. Wallach soon to follow. I had had no income from my mother for several months, so it seemed to me best that I should rent the house myself and sub-rent the rooms unfurnished. Mrs. Burche was consulted; told me she thought it was the best thing I could do; showed me a great deal of sympathy at the time; encouraged me to take the house by telling me she knew persons who she thought would rent rooms with me, mentioning Mrs. Chalice and Mr. Franklin Burche. Before I took possession of the house Mr. Wallack took Mr. Burche through that he might see the state it was in. Everyone understood that I was to rent the house on the same terms Mr. Crutchett had,
120 charging myself the same amount and renting out the shanties, as he had done.

Q. From the time, January, 1869, to the date of the death of Mrs. Hewitt, 15th of December, 1872, did you take charge of Mrs. Hewitt's maintenance and comfort?

A. I took entire charge of her, supplied her with clothing, with nurses, with medicine, with service of all sorts, and paid out much money from time to time therefor, and for the repair of the property and taxes and insurance thereon.

Q. Is this Exhibit S. L. W. No. 1, (see pp. 38–40,) filed December 1st, 1875, a correct account of the money with which you became chargeable as agent of Mrs. Hewitt and of the moneys which you expended in her behalf?

A. It is; I believe it to be a correct account.

121 Q. After the death of Mrs. Hewitt, what did you [do] in relation to the property?

A. I continued to reside there.

Q. Did you make any arrangement with Mrs. Burche to rent her moiety therefor?

A. I acknowledged my indebtedness to Mrs. Burche from the moment of my mother's death, told her that whenever she would settle or agree to divide the taxes and the repairs that were due on the house, I would pay her rent; I was in a very unsettled condition from the talk of the sale of the property, so could not rent any rooms in consequence.

Q. For how long did you continue in poss-ion of the property?

A. It was a little over a year, I think.

Q. State the facts in relation to the loan of $5,000 by Mrs. Mellen.

A. I found it impossible to rent the rooms unfurnished, and

122 to furnish them I negotiated a loan of $500 with the National Bank of the Republic, with which I furnished in part; rented the rooms one session, three to Judge Goldthaite, two to a Mr. Rowland, finding fire and light for the whole and a man servant to attend to them; but finding myself deprived of Mr. Wallach's assistance, and he himself obliged to be nursed, I was obliged to have money. I thought perhaps I could get it from the Masons, a loan of $500, secured on my part; it was for this loan Mrs. Burche applied to Mr. Stansbury. Mrs. Burche had been trying to raise money on her interest for years, but failed because it was an undivided interest, but now finding myself in debt for furniture and maintenance of the family, my mother included, in consequence of the failure of her rents, I consented to join Mrs. Burche in the loan of $5,000, $2,500 of which I received; appropriated it to the payment of these debts, depositing the balance in Ruff's bank, from which source I drew to pay my interest and taxes whenever there was a deficiency.

I went into the loan very reluctantly, fearing Mrs. Burche

123 would not be able to meet her interest. She assured me she had provided for this by agreeing to take Miss Mary Jane Taylor to board, and also that she would appropriate her money in making a market garden, and so make for herself an income, so as to enable her to pay in the future. The first of these expectations failed, owing to the illness and death of Miss Taylor, in June, 1872, and I never heard that the money was so invested as to realize her expectations in the second. This loan was secured by a deed of trust on the property mentioned in these proceedings. Up to the time that the property was advertised to be sold, December 8th,

1873, no instalment of interest had become due of which I had not paid my proportion. I paid my interest to Mr. J. C. G. Kennedy, one-half of every quarterly instalment that became due.

Q. Will you state whether, at the time of making the loan, there was any understanding that you and Mrs. Burche were each to pay one-half of each instalment that became due?

124 A. That was the understanding.

Q. At the time of the advertisement for the sale, did you have any negotiations, and if so, what, with Mrs. Mellen or any other person, and if so, whom, for the purchase of the property?

A. Just previous to the sale I had several conversations with Mrs. Mellen with regard to the default in interest, when she told me she must advertise and sell; I begged for delay, urging that I knew Mrs. Burche, when she knew that Mrs. Mellen was determined to foreclose, would pay her interest; subsequently, when Mr. Mellen and my son Richard were present, Mr. Mellen suggested to me that I should buy it myself; the details of the proposition I did not entirely understand; did not negotiate, but listened to the conversation between my son and Mr. Mellen, from which I understood that I could not buy it without I could raise sufficient to pay off Mrs. Burche's interest, and so give Mr. Mellen the first

125 mortgage which he required, and of course Mrs. Burche could not take a second; I never saw Mr. Mellen to talk to him after the advertisement, except for a few moments at Mr. Kennedy's office on the day of the sale, where I had gone to see if I could do anything to stop it; Mr. Raymond Burche came in, but left very quickly when he found out who was present, without making his business known; Major Frank Taylor and my son were there with me.

Q. Did you have any arrangement prior to the sale that, at the sale, you would become the purchaser, and would give Mrs. Mellen a first lien upon the property for the whole amount due her, to include a further advance for the expenses of the sale and taxes overdue, and a second deed of trust to secure to Mrs. Burche her moiety of the balance of the proceeds of sale?

A. There was no such arrangement; there was a proposition, which fell through in consequence of my not being able to pay Mrs. Burche.

126 Q. Did you know that Mrs. Burche had made such an arrangement with Mrs. Mellen?

A. I did not; I supposed Mrs. Susan M. Burche was the purchaser.

Q. Did you ever, in any manner, consent that the property should be sold?

A. I was willing the property should be sold at anything like its value, but was unwilling at the time on account of the panic. I authorized my son to propose to Mr. Mellen at the last moment to let me pay the interest that was due that the sale might be stopped and so gain time. I understood he said he could or would not without Mrs. Burche was willing.

Q. Did you at any time consent, or in any manner consent, that

Mrs. Burche should buy the property, giving a first deed for the whole amount due to Mrs. Mellen, and you to take a second deed of trust for your share of the balance of the proceeds of sale?

127 A. Never at any time; I never knew of any such arrangements until some time after the sale; I did not attend the sale made by Mr. Kennedy, trustee, December 8th, 1873.

Q. Did you employ an agent to attend it; if so, whom?

A. I had no agent there; I did not authorize any one to appear there in my behalf.

Q. Was Richard L. Wallach authorized to act at the sale in your behalf at all?

A. He was not.

Adjourned to Nov'r 22d, '76, at 11 a. m.

ANDERSON, *Ex'r.*

Nov. 22, '76—11 A. M.

Met pursuant to adjournment.

Adjourned by consent to Nov. 23d, '76, at 11 a. m.

ANDERSON, *Ex'r.*

128 Nov. 23d, 1876—11 a. m.

Met pursuant to adjournment.

Present: Messrs. Miller and Bradley.

The examination of the last witness (Mrs. WALLACH) is resumed.

The tems of accounts charged in Exhibit "S. L. W. No. 1" were all paid.

Q. In the fall of 1873, how often did you see Mr. & Mrs. Mellen at what times and places, and under what circumstances?

A. Mrs. Mellen called to see me at my own house, I think, twice alone. I think no one was present but ourselves. She called once or twice with Mr. Mellen, at which times my son was present. I saw Mr. Mellen once at Mr. Kennedy's office.

Q. Do I understand you to say that you never saw Mr. Mellen except when your son Richard was present?

A. I cannot recollect a single occasion when I saw Mr. Mellen without my son being present.

129 Q. Where are the vouchers for the account with Mrs. Hewitt?

A. The vouchers, with the submission and the award, were sent to the arbitrators, Messrs. Bradley & Pike.

Q. State whether you ever made any offer for this property; and if so, what it was, and to whom.

A. I authorized Mr. R. W. Downman to offer $10,000 for Mrs. Burche's half to Mr. Bradley, her attorney.

The last question and answer objected to by Mr. Bradley.

Q. What was done with this offer?

Objected to by Mr. Bradley.

A. I called on Mr. Downman for an answer, and he said Mr.

Bradley refused, and he (Mr. Bradley) should take the whole matter into court.

130 Q. Did you ever entertain, or receive, or make any other proposition for the purchase or sale of the property; if so, what?

Objected to by Mr. Bradley.

A. I did entertain the idea of purchasing the property, and talked with persons about the possibility of raising sufficient money to pay off Mrs. Burche, and so enable me to accept a proposition made by Mr. Mellen to pay the expenses of the sale, &c., and to continue the mortgage. I never heard of any other proposition.

Cross-examined by Mr. BRADLEY:

Q. Did you keep any account or memorandum of the expenses of your mother after you took charge of her?

A. Yes; her general expenses.

Q. Have you that account now?

A. I have not. Mr. Wallach had them at the time of his death, some of which I never found. After that, her general ex-

131 penses being always the same, for nursing, her board, &c., I did not keep an account.

Q. When did you last see that account?

A. A few weeks before Mr. Wallach's death; we were reading it over together, and, not needing it, I did not look for it until the time of the arbitration, when I couldn't find it.

Q. Who had charge of Mr. Wallach's papers after his death?

A. Mr. Wallach, twelve months before his death, was in that condition that he was not able to keep his papers in order, and there were numbers that we could not find. My son had the papers after his death. That account was roughly made out, and was probably not cared for properly; it was perhaps swept away by servants; that original account was made from bills he had. I think the most of them were made from vouchers. This account, "Exhibit S. L. W. No. 1," was made from vouchers that remained, and I paid some bills without taking receipts. I paid her board

132 and nurses without taking any receipts.

Q. Have you returned all the vouchers which you had when you made out this Exhibit No. 1?

A. I have.

Q. Are these all the papers which you returned to the arbitrators? They are marked Exhibits T. D. A. No. 1 and No. 2.

A. As I supposed they would be returned to me immediately, I took no copies of them, and of course cannot tell whether they are all here or not.

Q. Did anybody assist you in making out this account, "Ex. No. 1," and if anybody, who?

A. My son Richard and Mr. Oliver.

Q. On what occasion and for what purpose did Mr. Wallach, a few weeks before his death, show you or read to you the original account against Mrs. Hewitt?

133 A. For no particular reason; we were calculating our affairs, income, &c., and my mother's expenses.

Q. With whom was your mother living when she had that attack of paralysis?

A. With her nephew, Mr. Fendall Cain, in Washington city, on New York avenue.

Q. How long did she remain there after the commencement of the attack?

A. Something over two months—nearly three months, I think; I think it was quite three months; she was taken in January, and I think she left the first of April.

Q. Where were you living at that time?

A. On 5th street, keeping boarders.

Q. From the time of her first attack to her death did she ever speak articulately, and so she could be understood?

A. Very few words indeed she could speak; but for a
134 long time she could make us understand by our calling over things to her to which she would assent or dissent, showing that she understood. When I was paying out the first money I received, she made me understand that she owed some borrowed money, of which I knew nothing previously. She signed to Mrs. Cain and to her money, showing she wanted something done with it, and Mrs. Cain mentioned Mrs. Ballantyne's name and explained to me that she, my mother, had borrowed from Mrs. Ballantyne, which she wished me to pay. When I took the money from the amount she had in her own keeping, she was satisfied. That state of things occurred several times.

Q. What physician attended her at the commencement of the attack and during its continuance?

A. Doctor Garnett.

Q. Were you ever present at any interviews between Dr. Garnet and Mrs. Hewitt?

A. I was.

135 Q. In those interviews could she, by speech or signs, communicate with him?

A. I don't think she did; her reason seemed to be somewhat restored as her body was strengthened; none of us could tell really how much she understood, but a great deal the first year or two. I would read her prayers to her, and when I came to the Lord's Prayer and the Creed she always made an effort to repeat it, but only succeeded in making sounds; she tried to say the words, but could not utter them; I would test her by reading something else—some other part of the book; for a long time she detected it, and would approve by signs.

Q. Were any other persons present on the occasion of these religious services, or when you resorted to the tests of which you have spoken?

A. Yes; I think frequently there were persons present; I am inclined to think that Mrs. Burche was present, and I know the nurses were on several occasions, also my sons.

136 Q. Was Mrs. John Wilson, your aunt, ever there?

A. No; I have no recollection of her being there on those occasions.

Q. Was Doctor Pinkney there on any occasion when religious services were introduced or proposed to be introduced?

A. On one occasion he had prayers for her—I think on only one; this was during the first summer after she came to my house.

Q. Who were the nurses you say attended there at Mrs. Cain's?

A. There was a nurse I hired, Emilia; I don't know her last name at all. I hired two others to relieve her for a time when she was fatigued, whose names I don't know at all.

Q. Did either of them come to your house with her when she was removed there?

A. Emilia did.

137 Q. How long was she, your mother, at your house before you broke up and moved into the house on 6th street?

A. About a year.

Q. During that time did you employ a nurse exclusively for her service?

A. I did at first—going to Baltimore and getting one from the Church Home for that purpose—I got a very respectable trustworthy woman, who objected to the confinement of the position, and proposed to relieve it by doing things for me while I did her work by remaining at her post.

Q. How long was she there?

A. She was there about eight months, I should think. Her name was Mrs. Griffith, of Baltimore.

Q. Did you not, while Mrs. Griffith was there, discharge one of your servants, and thus reduce the number of them?

138 A. I dont recollect that I did at all. She often offered to do things for me and frequently did so.

Q. After she was gone, did you hire any nurse exclusively for your mother's service?

A. I had great trouble to get any trustworthy person at all. I hired a nurse exclusively for her service when I was not there to do the service myself.

Q. Did you have any greater number of servants in your house after Mrs. Griffith was gone than you had before your mother came there?

A. No I had no more servants after Mrs. Griffith was gone than I had before my mother came to my house. My daughter was ill and I had an extra servant, because I could not give my service to my mother and therefore did not call on her's.

Q. After you moved into the 6th street house, how many servants did you employ at any one time?

139 A. Two until I rented my rooms, and then I had a man servant all the time.

Q. Did not one of them assist in waiting on Mrs. Hewitt?

A. One of them was hired for her use exclusively, but did for me when I would take her place, by which arrangement I paid much less than I would have had to do for a nurse to take exclusive charge of her, for which at one time I had paid $5 a week. I found no one

who would stand the confinement of being always with her at any place—they were all glad to be relieved by my changing work.

Q. How many servants did you employ after your mothers' death, as long as you remained in that house?

A. One only.

Q. Were you renting rooms, taking boarders, or anything of that kind during that time?

140 A. I think Judge Goldthwaite was with me when my mother died. If he was not then I had but one room rented in my house. Mr. Robert Wallach, who was like a member of my family, was there. Pike & Johnson's offices were also there, but they had their own man servant to clean their offices.

Q. Do you recollect an interview with Mr. Richard Wallach, the brother of your husband, some short time before the sale of the property, in which you stated to him the terms of a proposition made to you by Mr. Mellen, in reference to the sale of the property under the deed of trust to Kennedy?

A. I had several conversations with Mr. Richard Wallach about that property. I do not remember any particular one.

Q. Do you remember, in any of those conversations, of having stated to him that Mr. Mellen had made a proposition to you, and what that proposition was?

A. I may have done so; I did to several persons.

141 Q. State, if you please, what that proposition was as you then stated it?

A. The conversation on that subject took place with my son before me. I did not understand the business and did not pretend to go into it. As far as I did understand it, he would pay the expenses of the sale, the taxes, and continue them. My son explained to him before me that that would not do; that it would be necessary to pay off Mrs. Burche, as she would not or could not take a second mortgage, which I hoped Mr. Mellen would do, even to the day before the sale.

Q. Did you not then state to Mr. Richard Wallach, the brother of your deceased husband, and to other persons, that Mr. Mellen proposed to let the sale go on, and if you purchased at the sale that he would lend a further sum of money, pay the taxes and all the liens upon the property, and let the old mortgage stand and take a new one for a new loan, and did you not, acting on the advice of friends, afterwards accept that proposition?

142 A. I never accepted the proposition. He said he would come back and fix up matters before the sale. The proposition was never accepted, and he never came back. I met him at Kennedy's office on the day of the sale a few minutes, but had very little conversation with him.

Q. When he made that proposition, whatever it was, did you or not ask a week's time to consider it?

A. I did not. I asked a week's time, hoping the interest would be paid, and so stop the sale, and so stated to Mr. & Mrs. Mellen, but said I would consider it during that week.

Q. In the morning of the sale, when you met Mr. Mellen at Mr.

Kennedy's office, what passed between you and him, or Mr. Kennedy, in reference to the sale?

A. I was in a very excited state, and do not remember what took place, except that Mr. Mellen said he had nothing to do with the form; he would do for one as soon as the other, or some such
143 expression. I saw that I could do nothing to stop the sale, and said very little to anybody. My object in going there was to stop the sale.

Q. After Cruchett left the house did you not receive from Mrs. Broneau $100 a month rent during the time you stated, for the main house only, as long as she occupied it, and from Pike & Johnson $50 a month as long as you remained in the house, and rent from two or more tenements until you left the house; and if so, how much did you receive a month from those same tenements?

A. The whole house was rented to Mrs. Broneau for $100 a month.

Q. After Mrs. Broneau left, state what rents were paid after you went into the house?

A. After Mr. Wallach's death I rented the offices to Pike & Johnson at $50 a month; one of the shanties was rented to a carpenter; the other was rented to Mr. Bell, but was vacant much of the time. The carpenter paid $10 a month, and I think the other paid $5 or $6.

SUSAN LAVINIA WALLACH.

144 Sworn to & subscribed before me this 23d day of November, 1876.

T. D. ANDERSON, *Ex. in Ch'ry.*

Adjourned to Nov. 28th, 1876, at 11 a. m.

ANDERSON, *Ex'r.*

145 NOV. 28TH, 1876—11 a. m.

Met pursuant to adjournment.

Adjourned by consent.

EX. ANDERSON, *Ex'r.*

DEC. 11TH, 1876—11 a. m.

Met by agreement of counsel.

Present: Messrs. Bradley and Miller.

Deposition of R. L. Wallach.

Whereupon RICHARD L. WALLACH, a witness of lawful age, a resident of Washington, D. C., produced, sworn, and examined by and for Mrs. S. Lavinia Wallach, deposes as follows:

Q. State your name, age, residence, occupation, acquaintance with and relation to the parties to these suits?

A. My name is Richaad L. Wallach; I am thirty-two years old; I reside in Washington, D. C., and am a lawyer by profession; I know all the parties to these suits; I am the son of Mrs. S. Lavinia

Wallach, and nephew to Mrs. Catharine Burche; I know the
146 property the subject of litigation in this suit; I know that my mother took charge of this property in 1869, but I know of no agreement in relation thereto other than a verbel agreement between Mrs. Wiltberger, my mother's aunt, and my mother.

My grandmother, Mrs. Hewitt, owned the life estate in the property under my grandfather's will, with remainder over to my mother and my aunt, surviving heirs. When my mother took possession, Mr. Crutchett occupied the property, together with the small tenements, as the tenant of Mrs. Hewitt, under a written lease made some years before, and not yet expired, at a yearly rental of $1,200 per year.

At that time my grandmother had been stricken with paralysis at the house of Mrs. Cain, on New York avenue, and came very near dying; but she partially recovered, but was left in a helpless condition, being totally unable to help herself. Mentally her con-
147 dition was much prostrated and weakened. She was then about 70 years old, and was incapacited from attending to business. She could not, with the exception of a very few words, articulate at all, and could only make inarticulate sounds; but we could talk to her and make ourselves understood to her for a long time before she died.

Up to a short time before her death, she recognized persons and some knowledge of events that were passing. She could not walk without assistance or attend to the calls of nature, or feed herself, and had to be fed and attended to like an infant. It was on account of her condition that my mother took charge of her and her property, at the suggestion of Mrs. Wiltberger. Mrs. Hewitt had nothing to say to this arrangement, but showed by signs and actions that she was perfectly contented, as far as we could judge. She showed the greatest affection for my mother and the balance of the family, and gave signs of decided dissatisfaction when other arrangements were suggested.

Mrs. Hewitt had no other property at this time.

148 Mr. Crutchett kept possession until about the 1st of August, 1870.

The property then laid idle one or two months—I think two months—and was then occupied by Mrs. Beineau at the same rent, $100 per month. She occupied the property for a month or so. There was four months rent lost between those two tenants; that is, by vacancy and their failure to pay rent.

My mother removed to the property to live in April, 1871; the property had then been vacant two months. As I understood the verbal agreement between my mother and Mrs. Wiltberger, Mrs. Hewitt's sister, it was that my mother was to take charge of my grandmother and her property, to draw the rents, support my grandmother, and do the best for her and the property she could, as far as the income would go. My mother took charge of Mrs. Hewitt, supported her, supplied her with clothing, sustenance, attention, &c., up to the time of her death, Dec. 15th, 1872.

She expended money by paying taxes, insurance, and re-

149 pairs on the property from the time Mrs. Hewitt was taken sick up to the time of her death. She supplied these things to Mrs. Hewitt at a greater cost than the receipts from her property. I know the paper marked Exhibit "S. L. W., No. 1," is a statement of account made out by me at my mother's request of receipts and expenditures in connection with my mother's charge of her mother and the property. This is a copy of the original filed before the arbitrators, Messrs. Bradley, Pike, and Darnielle. My knowledge of the items of this account is drawn from receipts and information furnished by my mother, who paid out the money, and for whose benefit the charges in the account were made, such as board, &c.

All the foregoing evidence touching the accounts is objected to by Mr. Bradley as being secondary.

The rental value was considered to be $100 per month; this was the most we ever got, and when my mother went into the
150 occupation of the property and put her own furniture in it, and provided fuel, lights, attendance, &c., and attempted to rent rooms in the house, the actual rent received from the house proper, and the tenements included, did not aggregate $1,200 a year.

I know of no other vouchers than the two filed in Mrs. Wallach's testimony and marked "T. D. A. No. 1" & "No. 2."

I know we considered $60 a month to be a moderate board for a lady in the condition my grandmother was at that time. There was a nurse kept for her the whole time. The wages paid to her were $10 a month for a larger portion of the time—all the time, in fact, except when the special nurses were employed.

I have knowledge that Mrs. Wallach offered to pay Mrs. Burche's rent for the property after Mrs. Hewitt's death. She offered that if Mrs. Burche would give her any certain tenure of the property, if only for six or seven months, she would then be enabled to
151 make enough by the rent of her rooms to pay her a portion of the rent monthly. The offer was made in my presence.

All testimony relating to offers to rent the house is objected to by Mr. Bradley.

Q. Relate how, if at all, Mrs. Wallach's tenure of the property was interfered with and uncertain after the death of Mrs. Hewitt.

A. Mrs. Burche showed great anxiety to sell the property after her mother's death, which was evidenced by her having a sign-board ("For Sale") placed on the house, and by placing her interest in the property in the hands of Gatchel & Kelly, auctioneers, and thus preventing us from being able to rent any of the rooms in the house on account of the uncertainty of the time when the sale would take place, or the tenure of the property. When applications were made for the rooms the question would be asked how long they could retain possession of them, or when a sale would be likely to
152 take place, we could give them no definite answer, not having

been informed by Mrs. Burche or her agent of the amount she desired for the property or the terms of sale.

Q. State the negotiations preceding the loan of $5,000 by the defendant, Rebecca R. Mellen, on the 15th of January, 1872.

A. On account of the failing health of my father, Charles S. Wallach, and the large amount of taxes accruing upon the property and our generally straitened circumstances, financially, my mother found it necessary to raise money on the property, and agreed to join in with Mrs. Burche in a negotiation for it. The original plan of which I was cognizant all the way through, being present at frequent conversations in relation thereto, was to raise the sum of $3,000, each party to take half that amount. After trying several real estate agents, Mr. Frederick Koones informed me, and through me Mrs. Burche and Mrs. Wallach, that he could let them
153 have the sum $5,000, but could not find the sum of $3,000 exactly. My mother was opposed to taking so large a sum as this, thinking at the time $3,000 was sufficient; but upon representations, either from my father or myself, I don't remember which, but in my presence, that $2,000 of the said $5,000 could be invested so as to pay its own interest, my mother agreed to take the whole amount. Afterwards, however, when the abstract was made out and the amount of taxes ascertained to be due, we found that $1,500, which mother wanted originally, would not be sufficient. My mother then proposed to become responsible for $500 more, and left the balance of $1,500 to be invested, as was intended of $2,000. Mrs. Burche would not agree to this, and my mother at last decided, through stress of circumstances to join in the deed of trust for the whole $5,000, and the deed to Mr. Kennedy was drawn up and signed by my father, who was then on his death-bed, and died shortly after.

154 The interest was paid on my mother's proportion of said indebtedness in quarterly instalments, most of them by myself personally to Mrs. Kennedy, and receipts taken by me therefor. This includes every instalment due prior to the advertisement of the property for sale. Prior to the sale, I can't say how long exactly, Mrs. Mellen, and also Mr. Mellen, separately and together, called on mother to see what arrangement could be made to have the arrearages of interest paid up. There were several conversations between these parties, at some of which I was present. Mrs. Burche's default was always acknowledged, and spoken of both by Mr. & Mrs. Mellen, when the state of affairs was explained by us to them, both in separate conversations, and when together. During these conversations, either Mr. or Mrs. Mellen, I am not sure which, suggested that the sale be allowed to go on, and mother to purchase the property. We replied that we knew of no means of raising the money necessary to accomplish it. Several of these conversations occurred, how many I don't remember, in one
155 of which Mr. or Mrs. Mellen offered to advance the money to pay the expenses of the sale and taxes, and let the $5,000 mortgage stand, and be added to the new amount advanced by them. I replied, in the presence of my mother, that I didn't see

how this could possibly be done, as Mrs. Burche would be clearly entitled to a first mortgage for her deferred payments, and they would have to take a second mortgage for the original loan, and the amount for expenses, &c., added. This they would not agree to. At this conversation, or a subsequent one, it was suggested by me, that, if they would advance money enough to pay the expenses of sale, and Mrs. Burches' share of the balance of purchase money, an arrangement might be made, my mother, at the time, stating that she would not be willing to give less than $20,000, in justice to Mrs. Burche. No arrangement, however, was made on this basis even, and my mother only sought after that to postpone the sale until Mrs. Burche could be persuaded to pay her portion of
156 the interest, or some arrangement could be made for the payment of the same.

There was no arrngement entered into between my mother and Mr. or Mrs. Mellen in regard to the purchase of the property by her.

Q. Did Mr. Mellen, in your presence, inform your mother that he had an arrangement with Mrs. Burche similar to that proposed to her?

A. He did not, but always led us to suppose that he was not willing to favor Mrs. Burche, as she had made the default. I went, on the day of the sale, 8th of December, 1873, to the office of Mr. Kennedy. Major Frank E. Taylor was also there. My mother was, at the time, very much excited and worried at the near approach of the sale. Our object in going up was to see if any arrangement could be made by which the sale could be stopped or a postponement secured. We found that nothing could be done, and came away hopeless, without any means to stop the sale,
157 except by paying the interest in arrear, and expenses of advertising.

I know Exhibit "S. L. W. No. 2" to defendant's answer in cause No. 3571. It is the advertisement under which the property was sold.

$5,000, with interest thereon, at the rate of ten per cent. per annum, from January 15th, 1873, was not then due on the mortgage, as my mother had paid her half of the interest, and none was due from her at the time of the sale.

Q. This advertisement purports to sell pursuant to a deed of trust recorded in liber 687. Have you examined the records, and do you know whether Mrs. Wallach was a party to any deed of trust recorded in that liber?

A. I have examined the records and know she was not a party to any deed of trust recorded in that liber.

The deed of trust to which she was a party, and referred to heretofore, is recorded in liber 667, folio 463. I attended the sale on the 8th of December, 1873. I cannot remember very well
158 how many they were at the sale. There were not a great many present. I should say about twenty or thirty were there. The bidding was not at all spirited. I think Mr. Jesse Wilson was there, and Mr. John B. Claggett, Mr. Walter Lennox

was there, and Major Frank E. Taylor was there a part of the time, whether all the time I don't know. Other gentlemen, whose names I don't remember, and whom I was familiar with, were there. I think Mr. Wilson bid, and Mr. John B. Claggett, to whom the property was knocked down. I bid once myself. I suppose there were other bids which I don't recollect. Mr. Lennox did not bid at all. I did not hear him bid. My bid was merely made to keep the sale going. I had no authority to bid and no means with which to comply with the terms of the sale, had the property been knocked down to me.

Q. Did you represent yourself, or do any act to lead people to believe that you were authorized to act in behalf of your mother or any other person at that sale?

159 A. I did not, and, I think, I expressly disclaimed having any authority, when questioned on the subject.

Q. Did you know that the auctioneer was authorized to accept you as the purchaser without making the deposit required by the terms of sale?

A. I did not. If I had had the means or intention to purchase the property, I would have expected to have been required to put up the deposit required, as any other stranger. Certainly no arrangment to the contrary had been entered into by me or anybody I knew of.

Q. Had you any communication with the trustee or auctioneer, on the premises at the time of this sale?

A. I had some conversation with both of them, I think, looking towards a postponement, so that some arrangement might be made to pay the interest, and I was informed it was too late, and that

160 no arrangement could be made without both parties agreeing to it, and the sale went on.

I don't know whether anybody was present at this conversation; it was while the crowd was there.

There was nobody present at that sale who had authority to act for my mother, to my knowledge. She was in the back room of the premises in a very excited state, crying and wringing her hands, and of course exciting me at the same time. The property was offered by the square foot, and several people came to me to find out the number of square feet in the property, and considerable confusion seemed to arise among those who were bidding or interested on account of having to make calculations as the bidding went on, as to what would be the sum total for the property, as each bid was made per square foot.

Adjourned to December 14th, 1876, at *at* 11 a. m.

ANDERSON, *Ex'r.*

161 DEC. 14TH, 1876—11 a. m.

Met pursuant to adjournment.

Present: Mr. Miller.

Mr. Bradley being unable to attend, it is adjourned.

ANDERSON, *Ex'r.*

162 JULY 12TH, 1877, at 12 m.

Met pursuant to agreement of counsel.

Present: Mr. Miller, Mrs. Wallach's solicitor.

Deposition of C. C. Duncanson.

Whereupon CHARLES C. DUNCANSON, a witness of lawful age, a resident of Washington, D. C., produced, sworn and examined by and for the defendant, deposes as follows:

Q. State your name, age, residence, and occupation.

A. My name is Charles C. Duncanson; my age is 31 years; my residence is Washington City; my occupation is that of a real estate agent and auctioneer.

Q. State how long you have been so employed.

A. About fifteen years ago I was first engaged in the business with William L. Wall & Co., and continued with him until March 1st, 1873, and then went into business myself, and have con-

163 tinuously, for about fifteen years, been engaged in the auction business.

Q. State what opportunities you have had for knowing the manner of conducting sales of real estate at auction.

A. Messrs. Wall & Co. did a large business—perhaps the second in the city, with every part of which I was familiar during the whole time I was with them. Since separating from them my house has had a large business, perhaps as large as any in the city. Besides, I have observed the conduct of real estate sales by other auctioneers.

Q. State whether it is the usual course to sell improved real estate by the square foot.

A. Not except where such improvements are very slight; that is, not where the improvements exceed $200 or $250.

Q. What is the usual manner of selling such property?

164 A. Improvements and grounds together, in lump, as a whole.

Q. Do you know the property mentioned in these proceedings?

A. I am well acquainted with the same, and recognize it from the description contained in defendant's Exhibit "S. L. W. No. 2."

Q. What would be the usual and ordinary course of selling that or similar property at auction?

A. By putting up the house, the improvements, and grounds, stating the number of square feet in the lot, and a description of the buildings, and asking for a bid for the whole in a lump.

Q. Did you ever know or hear of property as valuably improved as this being offered for sale in fee by the square foot?

A. I know of no instance, except from what I understand from the present case.

165 Q. State what, in your judgment, would be the most advantageous mode of selling such property.

A. In the manner in which I should judge from the advertisement marked defendant's Exhibit "S. L. W. No. 2," it was proposed

to be offered on the 8th December, 1873, namely, as a whole and in lump.

CHAS. C. DUNCANSON.

Sworn to and subscribed before me, this 12th day of January, 1877.

T. D. ANDERSON,
Ex'r in Ch'ry.

The foregoing testimony of the witness Duncanson, is objected to by Mr. Burche's solicitor, because of irrelevancy and want of materiality.

T. D. ANDERSON,
Ex'r in Ch'ry.

166 JANUARY 12th, 1877.

RICHARD L. WALLACH is here re-called and says:

Q. How many times did you see Mr. Mellen altogether in the fall of 1873? Where did those interviews take place, and who was present at them?

A. I saw him, to the best of my recollection, four or five times at least, and had conversations with him on this subject in the house on the corner of 6th and D streets in the presence of my mother, two or three times. On the street when nobody but myself was present, and in my office, No. 456 Louisiana avenue, in the presence of my uncle, Mr. Richard Wallach, I have had interviews with him.

Q. Did you, at any of those interviews, conclude any arrangement with him for your mother?

A. I did not.

Q. At any of those interviews was any arrangement concluded with him by your mother and in her behalf?

167 A. We had no arrangements with him whatever.

Q. At the time of the sale, did anybody, in your mother's behalf, consent to the manner of conducting the sale?

A. Nobody did, and nobody had authority so to do.

Q. In living in the house after the death of Mrs. Hewitt, so far as you know, how was your mother's business affected by the advertisement that the house was for sale?

A. It was affected very considerably by the fact that we were unable to answer inquiries as to when the sale would take place, which inquiries we were unable to answer by reason of Mrs. Burche's refusal or neglect, after one or more requests on our part, to name the price she wanted to ask for the property, and the terms upon which she was willing to sell. Several applications were made for rooms at that time, according to my recollection, by parties
168 anxious to take the rooms, but who would not do so and take the chance of being turned out when a sale should be made.

To the foregoing question and answer objection is made by Mrs. Burche's solicitor, because they are irrelevant.

Q. State if you have examined the title of the property in respect to the amount of taxes assessed thereupon during the time of your mother's occupancy thereof.

Objected to by Mrs. Burche's solicitor, as irrelevant and immaterial.

A. I have, but have preserved no data of what was due; I have a general recollection of the matter, and that is all.

Q. You are requested to re-examine the matter, and to report to the examiner the amounts thereof respectively.

A. I will do so.

The examination-in-chief of the witness, R. L. Wallach, is here closed.

Cross-examination is adjourned to Jan'y 15th, 1877, at 11 o'clock a. m.

ANDERSON, *Ex'r.*

169 JAN'Y 15th, 1877—11 a. m.

Met pursuant to adjournment.

Present: Messrs. Bradley & Miller.

Whereupon the witness, R. L. WALLACH, is here cross-examined.

Q. Where were you living at the time your grandmother was first stricken with paralysis?

A. I think we lived on C, between 2d & 3d streets. I was living at home with my mother and father.

Q. Where was Mrs. Cain, with whom Mrs. Hewitt was living, at that time?

A. Mrs. Cain was living on New York avenue, on the south side, three doors from 9th.

Q. What room in Mrs. Cain's house did she occupy?

A. I think it was the second story back room in the main building, although it may have been in the third story.

170 Q. How often were you at your grandmother's room after she was taken sick, and while she was at Mrs. Cain's?

A. Not more than two or three times, I think. I don't remember exactly.

Q. Did you ever meet Dr. Garnett, Mrs. Pedwick, Mrs. Burche, or Mrs. Wiltberger, or Bishop Pinkney, at either of those visits?

A. I am sure I never met Dr. Garnett nor Bishop Pinkney, and I do not remember particularly of having met either of the ladies mentioned, though I think it very probable I may have met them.

Q. How long did your visits last?

A. Never for a very long time. I went to see how my grandmother was getting along, I suppose. I sometimes made visits of inquiry at the house without even going into her room.

Q. What personal knowledge have you that your mother took charge of Mrs. Hewitt and her preperty at the suggestion of Mrs. Wiltberger?

171 A. I was informed by my mother in so many words that such an arrangement was made.

Q. Were you personally present at, and did you hear what passed between your mother and Mrs. Wiltberger?

A. My impression is that I heard my mother and Mrs. Wiltberger talk the matter over, but I cannot specify any particular time or place of such conversations.

Q. What personal knowledge have you of the rents actually received from rent of rooms of the house and from the tenements on the premises after the expiration of Crutchett's lease, and did not your father and mother alone attend to that business until his last illness?

A. My knowledge arose from my presence at numerous confidential conversations between my father and mother on the subject of the property and rents, besides being my father's law partner and fully cognizant of all his business, private or professional. On account of my father's ill health, to a certain extent, I had
172 to take his place in family matters, and was in the confidence of my mother to the fullest extent. When Mrs. Brineau had possession of the property I made frequent calls on her for the rent at my mother's and father's request, and failed to collect. After we moved into the property, sometimes father collected the rents of the little tenements, and sometimes I collected them, but I had personal knowledge during the whole time my mother was in possession of that property, that is, after we moved into it, of the matter of the rents, for sometimes they were paid to me and sometimes to her.

Q. Are you quite positive that the first proposition was made to your mother on the part of the Mellens in regard to advance of money to pay the expenses of the sale and taxes and let the $5,000 mortgage stand, was made in your presence and when Mr. and Mrs. Mellen were both present?

A. I am quite positive of that fact.

Q. Are you also positive that your reply, as given in your
173 examination-in-chief, was made in the presence and hearing of Mr. and Mrs. Mellen?

A. Such is my recollection now.

Q. Can you now recollect at which of the interviews that conversation took place?

A. It took place at an interview between my mother and Mr. and Mrs. Mellen, in the parlor of the house on the corner of 6th and D streets.

Q. Did anything further pass between you and them after your reply, as given in your examination-in-chief?

A. I don't remember the exact words used by them, but they left both my mother and myself with the impression that their feelings were much more friendly towards her than towards Mrs. Burche, on account of the fact of Mrs. Burche having made the default, but they made no specific promises, nor was any agreement entered into.

174 Q. Did any one suggest at that time that application should be made to Mrs. Burche to see if she would or not assent to the proposition then made by the Mellens?

A. I did not hear any such suggestion made, my recollection being that at that conversation they expressed an unwillingness to favor Mrs. Burche in the matter.

Q. Did you then understand the negotiations to be at an end?

A. I did not see any hope of accomplishing anything through the Mellens.

Q. Were there any subsequent negotiations relating to the sale of the property?

A. There were other conversations with Mr. Mellen that came to nothing.

Q. Can you repeat any of them?

A. I cannot verbatim.

Q. In substance?

175 A. I reiterated my opinion and statement that the only way the matter could be consummated was to raise enough money to pay off Mrs. Burche's share, so that we could give a first mortgage for the whole amount. At one time Mr. Mellen gave me reason to suppose that this might be done, but no further steps were taken to raise the money that I know of.

Q. What conversation did you have at your office, in the presence of Mr. Wallach, your uncle, with Mr. Mellen?

A. I think it is the conversation spoken of above. I met Mr. Mellen in the street, and walked to the office with him and introduced him to my uncle. I think he called at the office to see me another time after that, but will not be positive.

Q. Did you state to your uncle the object of Mr. Mellen's visit, and what proposition he had made, and consult him about it?

A. I think I did. He felt very much interested it the matter.

176 Q. Do you recollect his suggesting to you and Mr. Mellen that if your mother and aunt could be got to agree to Mr. Mellen's proposition there would be no difficulty about it at all?

A. I know that he, Uncle Richard, was always in favor of an amicable settlement of the matter, and expressed the hope and belief that Mrs. Burche would pay her interest, and thus stop the sale, but I do not know that any proposition was submitted to him, and I don't know that he made any suggestion of a joint action in the matter.

Q. Do you know whether or not your mother did or did not request Mr. Mellen to bid for her at the sale of the property?

A. She did not in my presence.

Q. Do you know personally anything of a proposition made by your mother to Mrs. Burche for the sale of this property, and to name the terms on which she would sell?

177 A. I know that a letter was written by Captain Pike, at my mother's request, to Messrs. Kelly & Gatchell, real estate agents, in whose hands Mrs. Burche had placed her interest in the property for sale, advising them that we had no means of replying to inquiries as to terms of sale, as nothing had been heard from Mrs. Burche on the subject. I took a copy of this letter, at Captain

Pike's request, and think I have it either at my office or Captain Pike's.

Q. Please to produce the copy of that letter, and file it with your deposition.

A. I will.

Q. Can you fix the date of that letter. At or about what was the date of it?

A. I can only say it was between the day of my grandmother's death and the sale of the property.

Q. Was it before or after that a controversy arose between them as to a sale of the property?

A. The letter was written after the controversy arose.

ANDERSON, *Ex'r.*

178 JAN. 15TH, 1877.

Deposition of J. M. McCalla.

Dr. J. M. MCCALLA, a witness of lawful age, a resident of Washington city, produced, sworn, and examined by and for the defendant, Mrs. S. Lavinia Wallach, deposes as follows:

Q. State your name, age, residence, and occupation?

A. My name is John M. McCalla; my age is thirty-nine; my residence is in the city of Washington; I am a doctor of medicine by occupation.

Q. Had you any acquaintance with Miss Mary Jane Taylor, and any business connection with her affairs?

A. I had. Miss Taylor very often asked my opinion about her money affairs, and about the investing of her money. I advised her about her pecuniary matters. I was also the agent of Mr. Joseph B. Varnum to pay interest upon certain loans.

179 Q. Did you for her, and at her request, pay any monies to Mrs. Catharine Burche; and if so, at what times and in what sums?

Objected to by Mrs. Burche's solicitor as irrelevant, and not responsive to any matter introduced in her testimony.

A. As executor of the will of Miss Taylor, I paid to Mrs. Raymond Burche the following sums: August 11th, 1873, $212\frac{55}{100}$; June 23d, $841\frac{44}{100}$; it was a residuary bequest; Miss Taylor died June 2d, 1872; she died at the Columbia Hospital; she was removed there from the residence of Mrs. Emma Derrick, where she had been living, I think, since March of that year.

Q. Did she live at any time during the last year of her life with Mrs. Raymond Burche?

A. I do not know.

Cross-examined by Mr. BRADLEY:

180 Q. Do you know what Mrs. Burche did with the money you paid her?

A. I do not.

J. M. McCALLA.

Sworn to and subscribed before me this 15th day of January, 1877.

T. D. ANDERSON,
Ex in Ch'ry.

Adjourned.

181 APRIL 23D, 1877.

Met to take testimony for the complainant, Mrs. Susan Lavinia Wallach.

Present: Mr. T. J. Miller, Mrs. Wallach's solicitor.

Deposition of Rich'd Wallach.

Whereupon, Mr. RICHARD WALLACH, witness of lawful age, a resident of Washington, D. C., produced, sworn, and examined by and for the complainant (Mrs. Wallach), deposes as follows. I am a lawyer by profession.

Q. Do you know the parties to these suits? State the extent of your acquaintance with and relationship to Mrs. Burche and Mrs. Wallach.

A. I know all of them well, with the exception of Elizabeth Hain and Rebecca R. Mellen; Mrs. Hain I have no recollection of ever having seen; Mrs. Mellen I have met once, perhaps twice, but have no acquaintance with her, except what results from a simple introduction, and hearing her converse for a few mo-
182 ments with my nephew, Mr. Richard L. Wallach, in my office, and in the presence of her husband; I am no relation whatever to Mrs. Burche, or to her husband; I have known them, however, from their earliest childhood; to Mrs. Wallach, I am brother-in-law; with Mr. Kennedy I have been acquainted a great many years.

Q. Had you any conversation with these parties, or either of them, in the fall and winter of 1873 with respect to a sale of the property in controversy in these suits, or to the fact that the interest on the mortgage was unpaid?

A. I met Mr. Kennedy casually, when he informed me that Mrs. Burche was in arrear in the interest to be paid by her on certain property at the corner of 6th and D streets, in the city of Washington, belonging to Mrs. Burche and her sister, Mrs. Wallach, and upon which he held a deed of trust, informing me that unless Mrs. Burche was more prompt in the payment of her interest the property would have to be sold, and requested me to urge Mrs.
183 Burche to pay up, and at the same time informed me that Mrs. Wallach had been prompt in paying her share of the interest. I saw Mr. Mellen twice, and Mrs. Mellen, if not twice certainly once, together in my office, at both of which times there was quite a protracted conversation had by them with my nephew, Mr. Richard L. Wallach, in relation to making some arrangement whereby his mother, Mrs. S. L. Wallach, could become the purchaser of the property, which, it was contemplated, would soon be advertised for sale by Mr. Kennedy, the trustee. I paid but very little attention

to the conversasion, tho' I may have occasionally made some suggestion relative thereto. I can form no idea, nor can I recollect what the propositions were. I have no doubt I had conversations with Mrs. Wallach about this property about this time which I not particularly remember.

Q Did Mrs. Wallach state to you "that Mr. Mellen proposed to let the sale go on, and if she purchased he would lend a
184 further sum of money, pay the taxes and all liens upon the property, and let the old mortgage stand and take a new mortgage for the new loan," or any similar proposition, contemplating that Mrs. Wallach would acquire the property by giving a second mortgage to secure any amount of the purchase-money that should be due Mrs. Burche; and, if so, did she, or any one else purporting to act as her agent, with your advice, accept such proposition?

A. I have no recollection of ever having any conversation to that effect with Mrs. Wallach or anyone else, and certainly, as counsel or friend, would not and did not advise her, or anyone acting as her agent, to any such course, deeming such an arrangement, if not prohibited by law, certainly indecorous and improper.

RICHARD WALLACH.

Sworn to and subscribed before me, this 23rd day of April, 1877.

T. D. ANDERSON,
Ex. in Ch'ry.

Adjourned to April 24th, 1877, 11 a. m.

185 APRIL 24th, 1877, at 11 a. m.

Met pursuant to adjournment.

Present: Mr. Miller, solicitor for Mrs. Wallach, and Mr. Bradley, solicitor for Mrs. Burche.

Deposition of Mrs. Colley.

Whereupon Mrs. MARY JANE COLLEY, a witness of lawful age, a resident of Washington, D. C., produced, sworn, and examined by and for the complainant, Mrs. Wallach, deposes as follows:

I am now engaged in keeping a boarding-house, called the Hamilton House, and know the prices that are ordinarily charged in the city of Washington for boarders. I have known and been familiar with this subject for the last twenty years. I knew of Mrs. Wallach's keeping a boarding-house in this city. I knew of Mrs. Hewitt's boarding with her.

Q. Will you please state, from your knowledge of the usual charges and of the accommodations that Mrs. Hewitt had while she boarded with Mrs. Wallach, what would be a reasonable charge?

186 A. According to my charges, I could not have boarded her and given her her washing for herself and servant for less than $100 per month.

Q. What do you think would have been a reasonable charge by Mrs. Wallach?

A. I was a constant visitor at the house, and always went to see Mrs. Wallach in her mother's room, and therefore I know pretty well the trouble and expense she was to Mrs. Wallach at this time. Being almost helpless, she required constant attention. She (Mrs. Hewitt) occupied one of the best rooms in the house, which otherwise occupied would very largely have contributed to pay the expenses of the house. And therefore I think that $75 per month would be a reasonable charge.

Q. According to your observation, did Mrs. Hewitt seem to be as comfortable as invalids similarly situated in boarding-houses generally are?

187 A. I can safely say that she was as comfortable there as she could have been in her own house or anywhere, and I am very glad to testify that Mrs. Wallach did devote her whole time and attention to the comfort of her mother.

Cross-examination waived.

M. J. COLLEY.

Sworn to and subscribed before me, this 24th day of April, 1877.

T. D. ANDERSON,
Ex. in Ch'y.

188 APRIL 24TH, 1877.

Richard L. Wallach is here recalled and asked to produce the tax bills, in response to a question asked in his examination-in-chief, on page 61, he further testifies:

I have examined the taxes, as requested at my former examination, and now reply that the first tax bill, a duplicate of which I herewith file, marked "Exhibit R. L. W. No. 1," for the year ending June 30th, 1870, was paid, one-half of it by my mother, the tax having been assessed and having become a charge upon the property, prior to any arrangement by my mother about the property. The other half was paid, I believe, by Mrs. Burche. I herewith also present the duplicates of two tax bills, marked Exhibits "R. L. W. No. 2." One is for the year ending June 30th, 1871, and the other for the year ending June 30th, 1872, and were wholly paid by my mother. I also herewith present a duplicate of the tax bill for the year ending June 30th, 1873, which tax was as-

189 sessed prior to the termination of the life estate of my grandmother, Mrs. Hewitt. It is filed and marked exhibit "R. L. W. No. 3." This bill was not paid by my mother, and was, I believe, the only charge for taxes on the life estate left unpaid by my mother. This bill, I believe, was once rendered as $346\frac{2}{100}$, and and I was not aware, as I believe that my mother was not, that the amount of this bill was $347\frac{72}{100}$, as it here appears in the collector's duplicate which figures seem to be corrected from the others.

In reply to the cross-interrogatory which I left unanswered, I have now to say that I made diligent search for the letter therein enquired after. I have looked among all my papers where that would probably be. I have also searched among those papers which

both of the counsel of my mother had in relation to this litigation, and therefore testify that the letter is lost and probably cannot be found at all.

I therefore say that the substance of the letter from my recollection now, was as stated in my answer to the cross-interrogatory.

RICHARD L. WALLACH.

190 Sworn to and subscribed before me this 24th day of April, 1877.

T. D. ANDERSON,
Ex. in Ch'ry.

The testimony of the complainant in the cross suit and the defendant in the original bill, Mrs. Wallach, is here closed.

ANDERSON, *Ex'r.*

191 *Decree and Reference to Auditor. Filed Jun.* 27, '77.

In the Supreme Court of the District of Columbia, sitting in Equity

CATHARINE BURCHE *vs.* S. LAVINIA WALLACH, JOS. C. G. KENNEDY and JOSEPH F. KELLY.	No. 3571. Equity Docket No. 13.
S. LAVINIA WALLACH *vs.* CATHARINE BURCHE, RAYMOND W. Burche, Rebecca R. Mellen, Elizabeth Hain, and others.	No. 4423. Equity Docket 15.

These two causes having been set for hearing on the bills, answers, exhibits, replication, and proofs taken in them respectively, and coming on to be heard and decided together by the consent of the parties thereto, and the court having read and heard the same, and also the argument of counsel for either party respec-
192 tively, and having given the same due consideration is of opinion and finds that the sale of the real estate in the said bills respectively, made by Jos. C. G. Kennedy, on the 8th day of December, 1873, under a deed of trust, executed by the said two complainants, to secure a debt of $5,000 due by them jointly to the said Rebecca R. Mellen, together with the interest thereon, as stipulated in said deed, is a lawful and valid sale; that the two said complainants agreed with the said Rebecca R. Mellen, that the said sale should be made, and if either of them purchased at said sale, the said Rebecca R. Mellen should lend to the said purchaser so much money as should be found necessary to pay off the liens and incumbrances on the said property, and the arrears of interests, with costs and expenses of sale, and add the same to the said original debt of five thousand dollars, and to take a new deed of trust for the aggregate amount of those two sums, which deed was to be the first mortgage on said property. That the said sale made by said
193 Jos. C. G. Kennedy was made pursuant to, and and in execu-

tion of, the said agreement; that these are questions between the said Catharine Burche and S. Lavinia Wallach.

First, as to the amount of the said liens and incumbrances.

Second, as to whether any, and if any, what portions thereof, are properly chargeable separately to said S. Lavinia Wallach, and what to her and said Catharine Burche jointly.

Third. Whether any, and if any, what sum is properly chargeable against the said S. Lavinia Wallach in favor of said Catharine Burche for and on account of the use and occupation of the said trust premises by said Lavinia.

Fourth. Whether said S. Lavinia is or not justly indebted to said Catharine for or on any other account set up in the pleadings in this cause which would furnish a just ground of rebate or set
194 off against the interest of said S. Lavinia in the proceeds of said sale, and entitle the said Catharine to a credit on the notes given by her to said Lavinia, and it is just and right that the said controversies shall be judically settled.

Now, therefore, it is by the court, and by the authority of the same, this 27th day of June, 1877, ordered, adjudged, and decreed that the said sale so as aforesaid made by the said Joseph C. G. Kennedy is a lawful and valid sale, and the said cause No. 3571, Catharine Burche *vs.* S. Lavania Wallach and others, be and the same is hereby referred to the auditor of this court, to state and return four accounts between the said Catharine Burche and S. Lavinia Wallach, as follows, to wit, an account showing what liens and incumbrances existed on the said trust property on the said 8th day of December, 1873.

Second. What portions thereof, if any, are justly chargeable to the separate account of said S. Lavinia Wallach as distin-
195 guished from the joint liability of the two sisters.

Third. An account to show whether any, and, if any, what sum is justly chargeable to said S. Lavinia Wallach in favor of Mrs. Catharine Burche for and on account of the use and occupation by said Lavinia of said trust premises.

Fourth. An account to show whether said Lavinia is or not justly indebted so said Catharine for or on any other account, and the amount thereof, which would furnish a just ground for rebate or set-off against the interest of said Lavinia in the proceeds of said sale, and entitle said Catharine to a credit on the notes she has executed to said Lavinia, and left in the hands of the said Jos. C. G. Kennedy, trustee as aforesaid.

And also an account revising and correcting the account of Jos. C. G. Kennedy, in evidence in the said cause.

And in the meanwhile, and until the further orders of the court, the injunction heretofore granted in this cause to stand.

By the court. A. W.

196 *Appeal to General Term. Filed July* 14, '77.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH. } No. 3571. Eq. Doc. 13.

The defendant, Wallach, prays an appeal to the general term from the decree passed in this cause.

MILLER & PIKE, *Solicitors.*

Appeal noticed as ordered.
By the clerk.

197 *Decree in General Term. Filed Jun.* 5, '78.

In the Supreme Court of the District of Columbia, in General Term, the 5th day of June, 1878.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH, JOSEPH C. G. KEENEDY, *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH,
vs.
CATHARINE BURCHE, REBECCA R. MELLEN, *et. al.* } No. 4423. Eq. Doc. 15.

These causes coming on to be heard together by the consent of counsel, and the court having heard and considered the argument of counsel, upon consideration by the court, it is ordered, adjudged, and decreed that the said causes relate to the same subject-matter ought not to be separated, and they are hereby consolidated as one cause.

Second. That the decree in the said cause, No. 3571, be,
198 and the same is hereby, modified as is hereinafter more fully stated.

Third. That the decree in the said cause, No. 4423, be, and the same is hereby, reversed.

Fourth. That said causes be remanded to the special term with instructions to consolidate the two causes, and to enter in said consolidated cause a decree and order as follows, to wit: The said sale made by said Joseph C. G. Kennedy, as trustee, set out and contained in the proceedings in these causes, be, and the same is hereby, confirmed and made valid; but inasmuch as the settlement therefor made by the said trustee, Mrs. R. R. Mellen, the creditor, and Mrs. Catharine Burche, the purchaser at said sale, is complained of, and it is alleged that the account on which said sale was settled was made up without the knowledge of said Susan L. Wallach, and by said Susan L. Wallach it is alleged that a much larger amount has been charged to her than is justly chargeable on such settlement, and in order to settle the equities of the parties interested in said sale, to wit, between the said Rebecca R. Mellen and

the said Susan L. Wallach and Catharine Burche, and
199 between the said Rebecca R. Mellen and the said Catherine Burche, and between the said Susan L. Wallach and the said Catharine Burche, growing out of said sale and otherwise, the said two causes consolidated into one be referred to James G. Payne, Esq., as special auditor of this court, to state and return to this court separate accounts as follows:

1st. An account to show what, if any, liens or incumbrances of any kind or character whatever existed on the day of the death of Mrs. Susan L. Hewitt, to wit, on the 15th day of December, A. D. 1872, on the property mentioned and described in the pleadings in these causes; and, if any, the particular kind or character of each, the amount thereof, when created or arising, and on what particular account.

2d. An account to show what portions, if any thereof, were justly chargeable to the separate account of Susan L. Wallach, and what portions, if any, to the separate account of Catharine Burche.

200 3d. An account to show what, if any, liens or incumbrances of any kind or character whatever arising or created between the day of Mrs. Susan L. Hewitt's death, the 15th day of December, A. D. 1872, and the day of the sale of said property made by Joseph C. G. Kennedy, as trustee, under the deed of trust made to him as such trustee by Catharine Burche and Raymond M. Burche, her husband, and Susan L. Wallach and Charles S. Wallach, her husband, to secure payment of a debt of $5,000 to Rebecca R. Mellen, and mentioned and described in the pleadings in these causes, to wit, the 8th day of December, A. D. 1873, existed on said 8th day of December, A. D. 1873, on said property; and, if any, the particular kind or character of each, the amount thereof, when created, and on what account.

4th. An account to show what portions, if any, thereof, were justly chargeable to the separate account of Susan L. Wallach; and what portion, if any, to the separate account of Catharine Burche.

5th. An account to show whether any, and, if any, what sum of money is justly chargeable to said Susan L. Wallach in favor
201 of said Catharine Burche for and on account of the use and occupation of said property, by said Susan L. Wallach, from the 15th day of December, A. D. 1872, up to and until the 15th day of January, A. D. 1874.

6th. An account to show whether said Susan L. Wallach is or is not justly indebted to said Catherine Burche for or on any other account, and, if so, in what amount, which would furnish a just ground of rebate or set off against the interest of the said Susan L. Wallach in the proceeds of said sale of said property under the deed of trust to said Joseph C. G. Kennedy from said Catherine and Raymond Burche, and Susan L. and Charles S. Wallach, mentioned and described in the pleadings in these causes.

7th. An account to show what were the actual expenses incurred by the said trustee, Kennedy, in and about the making of the sale of said property made by him on the 8th day of December, A. D. 1873, what amount of money, if any, has been actually paid for, and

on what account of such expenses, and the execution of said
202 trust, by whom and on what particular account each and every such payment was made.

8th. An account to show what liens and incumbrances, if any, of any and every kind of character whatsoever on said property has been paid off and satisfied by said Catharine Burche since the 8th day of December, A. D. 1873, and prior to the day of stating this account, and what amount of money, if any, has been actually paid on account of such lien or encumbrance, and that all the equities between the said parties touching the matters in controversy in these causes be, and the same are hereby, reserved until the final confirmation of the report which may hereafter be made by the said auditor in the premises.

By order of the court. D. K. CARTTER, *Ch'f Justice.*

203 *Original Bill. Filed Jan.* 16, '75.

In the Supreme Court of the District of Columbia, the — day of ——, A. D. 1875.

Between—

SUSAN L. WALLACH, Plaintiff,
and
JOSEPH C. G. KENNEDY, Trustee, RAYMOND BURCHE and Catharine Burche, his wife, Rebecca R. Mellen and Elizabeth Hain, Defendants.

No. 4423.
Eq. Doc. No. 15.

To the supreme court of the District of Columbia, holding an equity court for said district:

The plaintiff states as follows:

1st. She is a citizen of the District of Columbia, and brings this suit in her own right.

2d. That the defendants, except Elizabeth Hain and Rebecca R. Mellen, who are citizen of the State of Pennsylvania, are citizens of the District of Columbia, and are sued, the defendant Kennedy as trustee, the defendants Catharine Burche and Elizabeth Hain
204 in their own right, the defendant Raymond Burche in right of his wife, the said Catharine Burche, and the defendant Rebecca R. Mellen as beneficiary under a certain deed of trust to said defendant Kennedy.

3d. That the plaintiff and defendant, Catherine Burche, are the surviving children and heirs-at-law of William Hewitt and Susan Hewitt, his wife, both now deceased, and as such they, on the 15th day of January, A. D. 1872, were entitled, under the will of their father, the said William Hewitt, to have and enjoy as tenants in common an estate in remainder in fee-simple upon the death of their mother, the said Susan Hewitt, and the termination of the life estate then existing in her, and to certain real estate in the city of Washington, in said District of Columbia, more particularly known and described on the maps and ground plan of said city as parts of lots numbered one and two, in square numbered four

hundred and fifty-seven, with the buildings and appurtenances to the same belonging and appertaining.

205 4th. That on the said 15th day of January, A. D. 1872, the plaintiff and defendant, Catharine Burche, borrowed of the defendant, Rebecca R. Mellen, the sum of five thousand dollars, which they divided equally between them, each receiving thereof for her own sole and exclusive use and benefit the sum of twenty-five hundred dollars, and which they agree to repay, with interest at the rate of ten per centum per annum, at or before the expiration of five years from said 15th day of January, A. D. 1872; the said interest to be paid in quarterly instalments at the end of each and every quarter, the first whereof was to fall due and be payable on the 15th day of April, A. D. 1872.

5th. That in evidence of said indebtedness the plaintiff and her husband, Charles S. Wallach, and the defendant and her husband, the said Raymond Burche, on said 15th day of January, A. D. 1872, executed and delivered to the said Rebecca R. Mellen their joint and several promissory note for the sum of five thousand dollars, payable at or before the expiration of five years from the said 15th day

206 of January, A. D. 1872, with interest at the rate of ten per centum per annum, payable quarterly; and thereupon, in order to secure and make certain the payment of the principal and interest, as stipulated in and by said promissory note, they, on that day, conveyed to the defendant, Kennedy, by their certain deed, in fee simple, the hereinbefore described real estate, upon certain trusts in said deed mentioned and set forth, as will more fully and at large appear by reference to said deed, which was duly acknowledged by the parties grantor, and recorded among the land records of said District of Columbia in liber 667, folio 463, of the land records of said District, and is prayed to be taken as part of this bill. (See pp. 6, 13.)

6th. That the said Charles S. Wallach and Susan Hewitt are now both dead, the said Charles S. having departed this life on the 3d day of February, A. D. 1872, and the said Susan on the 15th day of December next thereafter.

7th. That at the death of the said Susan Hewitt, the plaintiff, under a certain family arrangement, was, and had been for

207 a period of time anterior thereto, in the occupancy and enjoyment of said real estate and appurtenances charged with the care and maintenance of the said Susan, whose advanced age and physical and mental infirmities incapacitated her from in any wise taking care of herself or attending to any manner of business, and made necessary the constant ministrations and attention of others for her safety and comfort.

8th. That the plaintiff remained in the possession, but not undisturbed enjoyment, of said real estate, buildings, and appurtenances until the 15th day of January, A. D. 1874, when she removed therefrom, and the same have, from that time until now, been in the possession and under the control of said Catharine and Raymond Burche, who have constantly kept the same at rent, and have and are receiving large sums of money therefrom.

9th. That the plaintiff paid her proportion, an equal one-half, of the interest that accrued on the indebtedness to the said
208 Rebecca R. Mellen up to and including the instalment due and payable for the quarter ending the 15th day of October, A. D. 1873, but the defendant, Catharine Burche, nor any one for her, paid any portion of said interest that accrued on and after the 15th day of January, A. D. 1873, though she could easily have done so had she so desired.

10th. That the plaintiff, remaining in the occupancy of the property after the death of the said Susan Hewitt, the defendant, Catharine Burche, not making any objection thereto, solicited the said Catharine to enter into some arrangement with her for the disposition of the property for their respective benefit, and submitted propositions for a lease or purchase of the said Catharine's interest in the same, or the sale of the entire property at private sale, upon the most advantageous terms that could be secured, but there was such difference of opinions between them that nothing satifactory to both could be agreed upon; that afterwards the said Catharine, failing to pay her proportion of the interest as the same fell due, on
209 and after the said 15th day of January, A. D. 1873, the plaintiff, who had no interest in any other real estate, and no other home for herself and her children, and earnestly and naturally desirous to avoid the loss of that she was then in the enjoyment of, further sought to have some agreement entered into for the disposition of the property, and renewed her propositions for such purpose or lease of the said Catharine's interest or private sale of the entire property, to all which the said Catharine gave no assent, or made more satisfactory response than to express her unwillingness to have the property sold at a less price than thirty thousand dollars, without, however, advising the plaintiff as to the terms upon which she desired a sale should be made.

11th. That sometime in May, A. D. 1873, the said Catharine gave notice to the public that said property was for sale by causing to be affixed to the same in a conspicuous place a placard, by which the public were advised that said property was for sale, and that to ascertain the terms of the sale so advertised, they should in-
210 quire within, meaning thereby that the inquiry should be made of some one in the occupation of the same. That this notice of sale was so given without the plaintiff's being first advised or consulted in reference thereto, and without her, or any one for her, ever being advised by the said Catharine, or any one in her behalf, as to the terms upon or manner in which she the said Catharine desired said property to be sold. That in consequence of this omission no other or more satisfactory answer could be given to those who made inquiries in regard to such advertised sale, than that the property was valued at thirty thousand dollars, and so the advertisement only resulted in preventing the plaintiff from renting the unoccupied portions of said property, although the same were kept duly advertised, and would have been rented upon advantageous terms but for it.

12th. That afterwards, by a certain stipulation in writing, entered

into by and between them on the 29th day of September, A. D. 1873, a copy whereof is herewith exhibited, marked S. L. W. No. 1, as part of this bill, (see pp. 15–18), the plaintiff and the said
211 Catharine Burche referred all matters in dispute between them to certain arbitrators, who, under and in pursuance of that submission, made an award in writing on the 8th day of January, A. D. 1873, copy whereof is also herewith exhibited, marked Exhibit S. L. W. No. 2, as part of this bill. (See pp. 20–26.)

13th. That in the making of said award the arbitrators committed mistakes both of fact and in law, to the plaintiff's prejudice and injury. Of fact, in charging against her the sum of five hundred and eighty-eight dollars and eighty cents, on the assumption that she, whilst occupying said property during the life time of the said Susan Hewitt, had suffered taxes to that amount to fall in arrear and be charged up against said property, whereas in truth and in fact, as abundantly appeared in proof before them, only the sum of three hundred and forty-eight dollars and nine cents was so in arrear and unpaid. In law, in adjudging the plaintiff to be solely liable for the payment of the entire amount of taxes so erroneously supposed to be in arrear, whereas she was properly chargeable with
212 the payment of but one-half the last mentioned sum of money; and also in adjudging the plaintiff to be so liable upon the said arrangement in reference to the care and maintenance of the said Susan Hewitt and the plaintiff's occupation of said property for that purpose, when said arrangement rested solely in parole, and was, so far as the said Catharine was concerned, without any consideration whatever, and she really not a party thereto. For which mistakes and because of the said Catharine's subsequent wrongful acts, and doings, and of the fact that nothing has ever been done towards carrying said award specifically into execution, the same should be vacated, set aside, and held for nought.

14th. That notwithstanding said submission and the award thereunder, the defendant Catharine Burche being well advised as to the plaintiff's straitened circumstances, caused in part by her placarding the property as hereinbefore stated, continued to neglect and refuse to pay any portion of the interest that accrued on said indebtedness from and after the said 15th day of January, A. D. 1873, craftily intending thereby, and upon an arrangement that was privately
213 entered into by and between herself and the defendant Mellen, to take an unconscientious advantage of the plaintiff, and perpetrate a fraud upon her, by making such non-payment of interest the pretext for an ostensible sale of said property under the provisions of the deed whereby the same had been conveyed in trust as aforesaid to the defendant Kennedy, at which she, the said Catharine, being required to pay but a small amount in cash on account of said indebtedness and the interest accrued thereon, and the expenses of the proposed sale, should ostensibly become the purchaser of said property, and thereby made to appear as the sole owner thereof *thereof*, there should be a novation in some form of the said indebtedness, with security for the payment of such novated debt, by a new deed of trust of said property for the said Mellen's benefit, so that, if the sale should be

permitted to stand as valid, there would in reality be but a selling out of the plaintiff's interest in said property at a sacrifice.

15th. That in furtherance of this design on the part of the defendant, Catharine Burche, and of the arrangement that had
214 been so entered into by and between the said Catharine and the defendant Mellen, under and by virtue of which the said Catharine was to have the privilege of bidding for said property at such ostensible sale on other and more advantageous terms than would be offered to the general public, and of thereby defrauding the plaintiff of her interest therein, the defendant Kennedy, acting by direction of the defendant Mellen, on the 29th day of November, A. D. 1873, advertised said property for sale at public auction, to be made on the 8th day of December next thereafter, copy of which advertisement is herewith exhibited, marked Exhibit S. L. W. No. 3, as part of this bill, (see pp. 44–45,) and on said last-named day offered the same, with the extensive and valuable improvements thereon, for sale by the square foot, and struck the same off at and for the price of two dollars and fifty-eight cents per square foot, to John Clagett, acting at such sale as the agent of the said Catharine Burche.

16th. That independent of said arrangement between the said Catharine Burche and Rebecca R. Mellen, the defendant Kennedy
215 did not use due discretion in advertising and attempting a sale of said property, and committed grave errors therein, to the great wrong and injury of the plaintiff: 1st, in advertising and offering the property for sale at a time when there was great and general financial distress and general depression in business; 2d, in selling in a most unusual manner, by the square foot, highly improved property, without having previously given notice to the public that the property would be so offered for sale, and how many square feet it contained; 3d, in advertising that the property would be offered for sale under and by virtue of a deed recorded in liber 687, folio 463, of the land records of the District of Columbia, when the only deed that conferred upon him the power to so offer the property for sale was recorded in liber 667, folio 463, of those records, whereby the public were deprived of information which should have been furnished, and which the plaintiff's interests required absolutely should have been correctly given, in order to enable those who desired to bid at such sale to examine into the validity of the conveyance to the said Kennedy, under and by virtue
216 of which only could he offer the property for sale, and to satisfy themselves as to the regularity of his proceedings in the premises, and be thereby encouraged to compete for said property at such proposed sale; 4th, in notifying the public in and by said advertisement that the purchaser at such proposed sale would be required to pay in cash five thousand dollars, with interest at the rate of ten per centum per annum from January 5th, 1873, when only one half that amount of interest could lawfully be demanded, as the plaintiff, as hereinbefore stated, had theretofore paid one-half such interest. And that by reason of the said several omissions and errors the property failed to bring at said sale its full value.

17th. That the plaintiff has never admitted that said sale was in any respect a valid one, nor has she ever received, or sought to receive, any benefit therefrom, or to claim anything thereunder; but on the contrary, shortly after the same was made, she, by her attorneys, gave notice in writing to the defendant, Kennedy, who demanded of her possession of said property at the instance
217 of the said Catharine Burche, that she denied that said sale was valid, and declined to yield to the said Catharine possession of the property under claim of title conferred thereby, and would, if necessary, institute legal proceedings to have said sale set aside.

18th. That the defendant, Kennedy, under and in pursuance of of said sale, executed on the 15th day of December, A. D. 1873, and delivered to the defendant, Catharine Burche, his deed of conveyance for said property, which was duly recorded on the 24th day of that month in liber 740, folio 122, of the land records of said District; that the said Catharine thereupon, by her deed, bearing date and acknowledged by her the said 24th day of December, A. D. 1873, conveyed the same to the defendant, Mellen, in trust, to secure the payment of an indebtedness of eight thousand two hundred dollars, alleged to be due from the said Catharine to the defendant, Elizabeth Hain, and to be payable in five years thereafter with interest at the rate of ten per centum per annum, payable quarterly, the principal of said indebtedness being evidenced by
218 the promissory note of the said Catharine to the said Hain for the sum of eight thousand two hundred dollars, payable five years from its date, the said 24th day of December, A. D. 1873, and the several instalments of interest thereon by twenty other promissory notes from the said Catharine to the said Hain, each for the sum of two hundred and five dollars, paying consecutively each and every three months of the five years in which said principal sum was to become due, and be payable from and after their date, the said 24th day of December, A. D. 1873, all which will more fully appear by reference to said deed of trust recorded on that day in liber 740, folio 124, of the land records of said District, and, with the deed from the said Kennedy to the said Catharine, is prayed to be taken as part of this bill. (See pp. 67–79.)

19th. That the defendant, Mellen, received said deed of trust, though she well knew all the circumstances connected with the making of said sale and deeds, and the plaintiff verily believes and so charges that the said Elizabeth Hain, who certainly was not then nor now is a resident of said district, was, if not a purely
219 fictitious person, merely introduced into and connected with said transaction as a blind to cover what was nothing more in substance than a novation by the said Catherine of the original indebtedness due by her and the plaintiff jointly and severally to the said Mellen; also that said several notes executed by the said Catharine to the said Hain have always been and are now held and controlled by the said Mellen in her own right and for her sole and exclusive use and benefit, and that the said Hain has not now nor never has had any real *bona fide* interest in them.

That if the sale made by the defendant, Kennedy, were a valid one, there would, according to the defendant Kennedy's representations, be due to the plaintiff from the defendant, Catharine Burche, after payment of the principal of said indebtedness and the interest thereon and expenses of said sale, the sum of four thousand four hundred and eight dollars and sixty cents as plaintiff's proportionate share of the price, at and for which said property was struck off at said sale to the said Catharine, but this plaintiff does not know what were the expenses of said sale, and therefore does
220 not admit that such statement of the account is correct.

20th. That the defendant, Catharine Burch, in order to evidence the existence of such alleged indebtedness from herself to the plaintiff, has executed to the defendant, Kennedy, for the plaintiff's benefit, her two promissory notes, each bearing date the 24th day of December, A. D. 1873, and for the sum of two thousand two hundred and four dollars and thirty cents, payable respectively one and two years after their said date, with interest at the rate of ten per centum per annum, and to secure the payment of the same, has conveyed said property to Anthony Hyde and Albert F. Fox, in trust by her deed of conveyance bearing date the said 24th day of December, A. D. 1873, and acknowledged by her on the 31st day of that month, as will more fully appear by reference to the same, which was on the 7th day of January, A. D. 1874, recorded in liber 741, folio 251 of the land records of said District, and is prayed to be taken as part of this bill. (See pp. 81–86.)

21st. That the defendant, Catherine Burche, falsely pretending that she has paid off taxes charged against said property
221 which should have been paid by the plaintiff, and setting up groundless claims under said award which she has completely ignored and violated, has filed in this honorable court her bill against the plaintiff, whereby she seeks to reach the plaintiff's supposed interest in the price for which said property was so sold to her for the satisfaction of said false and fraudulent claims and inequitably and unjustly to prevent, if possible, the plaintiff from realizing anything whatever from her interest in said property.

And the plaintiff humbly prays:

That the defendants hereto may be required to answer the several matters herein set forth, the same as if they and each of them were thereto specifically interrogated.

That an account may be taken under the order of this honorable court of the rents and profits of said real estate, and of all other matters between the plaintiff and the defendants and each of them relative to said property.

That the award may be set aside and held for naught.

222 That the pretended sale may be set aside and the said deed from defendant Kennedy to defendant Catharine Burche, and those from said Catharine to the defendants Mellen and Hyde and Fox respectively, may be directed to be delivered up and cancelled.

That the said property may be sold under the directions of this

honorable court, and some fit person be appointed trustee to make such sale.

That a receiver may be appointed to take charge of said property, to collect the rents thereof during the pendency of this suit, and to apply the same as far as may be necessary to the payment of the taxes, insurance, and repairs thereon, and as the exigency of said property may require.

That the honorable court grant unto the plaintiff the writ of subpœna issuing out of and under the seal of this honorable court, to be directed to the said Joseph C. G. Kennedy as trustee, Raymond Burche, and Catharine Burche his wife, Rebecca R. Mellen, and Elizabeth Hain, commanding them, and each of them, by a certain day, and under a certain penalty therein to be inserted, to be and appear before this honorable court, and then and there to answer the premises, and further to stand to and abide
223 such order and decree therein as shall be agreeable to equity and good conscience, that the plaintiff m .y have such other and further relief as she is entitled to, and the nature of her case may require.

LUTHER H. PIKE,
Sol'r for Plaintiff.

Subpœna.

In the Supreme Court of the District of Columbia. June 16th, 1875.

SUSAN L. WALLACH, complainant,
against
CATHARINE BURCHE *et al.*, defendants. } No. 4223. Equity Docket 13.

The President of the United States to Catharine Burche, Raymond Burche, Joseph C. G. Kennedy, Rebecca R. Mellen, and Eliza-Beth Hain, defendants.

You are hereby commanded to appear in this court at its first special term, occurring twenty days after service of this sub-
224 pœna, and answer the exigency of the bill under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, Chief Justice.

[SEAL.] R. J. MEIGS, *Clerk, &c.*
By L. P. WILLIAMS, *Ass't Clerk.*

Return of Marshal.

Sum'd Catharine and Raymond Burche and J. C. G. Kennedy. Not to be found, the others.

June 26, '75. ALEX. SHARP, *Marshal.*

L. H. PIKE & THOS. J. MILLER.

225 *Answer of R. W. Burche and Catharine Burche. Filed Sept. 3, '75.*

In the Supreme Court of the District of Columbia, holding an Equity Term.

CATHARINE BURCHE and RAYMOND W. BURCHE *vs.* SUSAN L. WALLACH.	In Equity. No. 4423. Dock. 15.

The answer of Raymond W. Burche and Catharine Burche, his wife, impleaded with Joseph C. G. Kennedy, trustee, Rebecca R. Mellen, and Elizabeth Hain, to the bill of complaint of Susan L. Wallach.

The defendants, each answering for himself and herself, say—

1. They do not know whether the complainant is or is not now a citizen of the District of Columbia, but they have been credibly informed that she went to Europe more than a year ago to reside with her son in Paris, France.

2. These defendants are not citizens of the District of Columbia, but are now and have been for many years citizens of the
226 State of Maryland, residing in Montgomery county, in said State.

3. They admit the facts set out in the 3d paragraph of said bill.

4. They also admit the facts set out in the 4th paragraph.

5. They further admit the facts set out in the 5th paragraph.

6. And they admit the facts stated in the 6th paragraph.

7. They admit the general statement of facts set out in the 7th paragraph of said bill, with this qualification, exception, and explanation: that what is therein called a certain family arrangement was, in point of fact, a distinct and explicit agreement between the said Lavinia and the defendant Catharine, which will be fully stated hereinafter. Mrs. Susan L. Hewit, the mother of the complainant and this defendant, was stricken with paralysis, which so incapacitated her as to render her utterly incompetent to take care of her personal estate. She had some furniture and a life estate in the real property involved in this cause, and nothing else for her support. Under these circumstances it was through the inter-
227 vention of Mrs. Wiltberger, the sister of Mrs. Hewitt, distinctly agreed by and between the complainant and this defendant Catharine, that the said complainant should take sole possession of the said estate and whatever Mrs. Hewitt had, and make the best use she could of it, receive all the rents and profits, pay all the burdens of all kinds upon it, and take charge and provide *of* their said mother so long as she should live; and under this agreement the complainant in fact took charge of their said mother and of her estate, and continued such charge until their said mother's death; and these defendants are informed, believe, and charge the same to be true, that at the time the said agreement was made, and during the lifetime of Mrs. Hewitt, after that, the gross annual income of

her estate was worth more than $1,300, while the expense of clothing, and all expenses other than board and nursing of Mrs. Hewitt, were merely nominal, she being bed-ridden.

8. To the eighth paragraph she says the complainant did, as she says, remain in the possession of the said real estate till the
228 15th of January, 1874, when she removed from the same. These defendants say that so far as they, or either of them, are concerned, such possession by complainant was undisturbed, except that on the 15th day of December, 1873, the same was sold under a deed of trust and bought by the defendant Catharine, and she, on the said 15th of January, 1874, took possession thereof as such purchaser, and still holds the same in her own separate right as purchaser.

9. These defendants admit that the said complainant paid her one-half part of the interest on the note given by said complainant and this defendant, Catharine, to the 1st of Oct., 1873, and this defendant, Catharine, did not pay any portion of said interest after the 1st of January, 1873, and she says, in point of fact, she was literally unable to do so by reason that the complainant, from the period of their mother's death, withheld from the said Catharine her portion of the income from the said estate, and applied the same to her own uses, well knowing that said Catharine had no other source of income; that her husband, the said Raymond, had a large
229 family to support, and was embarrassed, and for the time unable to lend or —— the necessary money to said Catharine.

10. These defendants say, that after the death of Mrs. Hewitt, the complainant remained in possession of the said premises, but they say distinctly, it was with clear understanding and agreement, between her and this defendant, Catharine, made by themselves, and through their aunt, Mrs. Wiltberger, that complainant should pay to said Catharine a sum equal to one-half the property had theretofore been bringing in, and this they are prepared to prove. The other statements contained in this paragraph are not true in substance or in fact. Shortly after Mrs. Hewitt's death, the complainant wrote to said Catharine, proposing to leave the settlement of their affairs to some third party. Said Catharine replied, she saw no necessity of that, as she thought they could settle them, but if she still desired it, she would agree to that course. Nothing further occurred. These defendants, each for himself and herself, deny
230 that propositions were made by complainant to said Catharine for a lease or purchase of said Catharine's interest, except that on one occasion complainant's son, Richard, asked said Catharine what she would take for her interest in it, and she answered, "just as much as I can get;" and as to the sale of the entire property, she recollects only one occasion on which a conversation took place with the complainant on the subject, and in that the said Catherine asked complainant if she "would be willing to take thirty thousand dollars for it," as she had more than once heard complainant say it was worth that much. And they and each of them say that the said Catharine expressed her unwilling-

ness to have the property sold for less than $30,000; to the contrary thereof, they, and each of them, say that she, the said Catharine, never fixed any definite price upon it, but expressed her readiness to have it set up and sold at public auction.

11. As to the 11th paragraph these defendants say it is true that in May, 1873, said Catharine gave notice to the public that said property was for sale, and they say distinctly that this was done with the knowledge and consent of complainant. The facts
231 are these: complainant was about to make a visit to New York; she was in arrear for her rent for said Catharine; she had made no provisions for it. Said Catharine called to see her, and in the course of conversation proposed to complainant to advertise the property for sale; she replied she had no money to do so, but as she was leaving the city any arrangement said Catharine might make with Mr. Pike, or her son Richard, relative to the disposal of the property would be acceded to by her. Said Catharine then saw complainant's said son Richard, and told him of this, adding, "as your mother cannot afford to advertise in daily papers we had better place a placard on the fence at the corner of the lot." He agreed. This was done, directing persons seeking to purchase to enquire within. Mr. Pike's office was in the house and he was complainant's legal adviser. These defendants deny that the placing of that placard on the fence did any injury of any kind to complainant's business.

12. As to the matters in this paragraph defendants admit them.

232 13. As to the award made under the submission mentioned in the 12th paragraph, these defendants say they will maintain that said award was right in fact and law, and they pray to have the same advantage herein as if they had formerly pleaded to this paragraph.

14 & 15. These defendants answer the 14th & 15th paragraph together, because they can thus give a better response to the matters and things therein set up, than by answering separately. These defendants say they never did, nor did either of them, see or correspond with their co-defendant, Elizabeth Hain, nor did they or either of them ever see or correspond with, or know, the said Rebecca R. Mellen until after the advertisement of the said sale of December, 1873. They have already admitted that after January, 1873, the said Catharine did not pay, and they have stated that, by reason of complainant's failure to pay the rent of the said property, they, said Catharine, was utterly unable to pay the same. Mrs. Mellen required the interest to be paid, as it was one of her sources of income for her support, and her husband required the said interest to be promptly paid, or in default thereof, that
233 the property should be sold. She is informed, believes, and offers to prove, and charges the same to be true, that acting as the agent of said Rebecca, he had interviews with complainant, in which he made the same demand, and told her if the interest was not paid, the property must be sold. She did not then deny that she owed the said Catharine more than the amount of interest due

on said joint note, but expressed her desire to have the property sold; that if she could make the necessary arrangements, she might purchase it herself; that in addition to the $5,000 loaned upon the said deed of trust, there were liens upon it amounting to several hundred dollars for taxes, and if he would agree to loan her enough money to pay off those liens, and renew the loan of the five thousand dollars, she would have the sale made, and would purchase the property, giving a new deed of trust for the whole amount of the new loan. To this the said Mellen, acted by authority of his said wife, consented. After that, and without taking any further step in the matter, the said Mellen of his own motion, and without any
234 communication with these defendants, or either of them, and without any knowledge on their part, came to these defendants, told them of what had passed between himself and complainant, and made the same offer to said Catharine, who at once accepted. He then ordered Mr. Kennedy, one of the defendants and trustee in said deed of trust, to proceed with the sale, which was with the full knowledge and consent of said complainant, and at the sale the said Mellen was desired to bid for complainant, but declined, and complainant's agent bid against the said Catharine's agent to within a few dollars of the price at which it was sold. This is the truth in regard to the transactions, facts, and statements of these two paragraps, and as far as those statements differ from this they are untrue. These defendants deny all fraud or fraudulent combination with said Mellen, or any other person or persons, in regard to said sale, and aver and will prove that the sale was made with free consent of complainant and said Catharine, and was carried out to its completion under the strictest terms of
235 the agreement made by said complainant with said Mellen, substituting only the name of the said Catharine in place of complainant; and these defendants further say, in point of fact, that after the said sale it was ascertained that the liens and incumbrances on the said property, instead of being between seven and eight hundred dollars, as they had been led to believe by the complainant, and as she had represented them to be in her said negotiation with said Mellen, amounted to a sum exceeding three thousand dollars, and said Rebecca Mellen not having that amount at hand, as these defendants are informed and believe, borrowed the same from her mother, Elizabeth Hain, and for her security had the note and deed of trust made out in her name; with all this neither of these defendants had anytning to do, but the said Catharine received the money from the said Rebecca Mellen, and executed the note and deed of trust as she was requested. She denies in terms, and in general and particular, that she has, by any arrangement with said Mellen or with any one else, to bid for the said property on
236 more advantageous terms than the complainant. She admits that at the said sale the property was bought by her agent at $2.58 per sq. ft., and she expressly says she did not know the property was advertised until the advertisement was pointed out by a friend. She says further there was no error in said Kennedy's advertising and selling the said property at a time when there was great and general

financial depression in business, for, she says, it was advertised and sold with the express knowledge and consent of complainant, whose agent bid for it by her authority at said sale; nor was there any error in selling it by the sq. ft., as is alleged in said bill, as where there is vacant ground, as there was in this case, attached to the improved part, it is customary to sell by the sq. ft, and more especially in this particular case the auctioneer was requested by Walter Lenox, Esquire, to sell by the sq. ft., and she is informed and verily believes, and so states on information and belief, that the said Walter Lenox, Esq., was therein acting as the agent of said complainant, and in point of fact complainant acquiesced therein
237 through her son and agent, Richard Wallach, who bid for her at said sale.

She has no knowledge of the fact or information in regard to it, whether the reference to the record to the said deed of trust was or was not correctly stated in the advertisement of said sale, and does not admit the same, as stated, to be true, but she is advised that under the facts and circumstances herein stated, it is not material if the alleged error was or was not made.

17. These defendants say they are not informed, save by the said bill, and by an answer filed by said complainant to a bill filed against her by the said Catharine, to be presently referred to, whether complainant ever admitted that said sale was in any respect a valid one. She believes it is true that complainant never has sought to receive any benefit therefrom; they know nothing of any notice in writing to said Kennedy to the effect set out in this paragraph; further, they allege that shortly after said sale, to wit, on the —— day ——, this defendant, Catharine, filed in this court, No. ——, against the said Lavinia,
238 setting up the said sale, and seeking an account of the proceeds thereof, charging the said Lavinia with certain sums of money, fairly due by her to said Catharine on account of said property, and to be deducted from her share of proceeds of the said sale, and praying an injunction to restrain her from collecting her said share until said account should be taken; to which said suit said Lavinia answered, and which said suit is still pending and undecided, and ought to be heard and tried at the same time as this cause; and they pray leave to refer to the same in the same presence with the same effect as if the proceedings therein were incorporated in this answer.

18. These defendants admit the facts to be true as they are set out in the 18th paragraph.

19. These defendants have no knowledge, information, or belief as to the matters contained in the 19th paragraph other than this, that the said Catharine, pursuant to her said agreement made with Mr. Mellen, husband of said Rebecca Mellen, received from him, as the agent of Mrs. Mellen, the difference between said debt of $5,000, with interest and costs, and the sum total of said debt, in-
239 terest, and costs, and the amount of the encumbrance of said property, and the said difference was all applied to removal of said encumbrances, which she is fully prepared to prove. She does not know whether the said Elizabeth Ham was or was not interested in the said transaction, as she dealt entirely with Mr. Mellen,

as the agent of his wife, but she says she is informed and believes the facts stated by her in answer to the 14th & 15th paragraph- of said bill are true, and she distinctly denies that said transaction was intended to be a novation of the original indebtedness, or that she has ever had any knowledgde or information as to how far the said Elizabeth Hain was interested in said sale [or] loan, or whether said Rebecca Mellen had any control over or interest in the notes given to her by said Catherine, as purchaser of said sale; and as to what is said in said paragraph in regard to interest of complainant in said sale she, said Catharine, says that will depend on the judgment of the court in said cause No. ——.

240 20. These defendants admit the facts stated in paragraph No. 20.

21. The defendants say that they have no further or other answer to make to the twenty-first paragraph than to refer to said cause named in said paragraph, wherein all the matters herein drawn in question will be settled, and to deny that said Catharine hath set up any false pretenses, or has ever ignored or violated the award therein referred to.

And having fully answered they pray to be hence dismissed with their costs.

CATHARINE BURCHE.
RAYMOND W. BURCHE.

JOS. H. BRADLEY, *Sol'r for Def'ts.*

Mrs. Catharine Burche and Raymond W. Burche her husband, make oath according to law, that they have, and each of them has read the foregoing answer signed by them and understand the same, and that the facts therein stated as of their own knowledge, or of the knowledge of each of them respectively are true, and such of said facts as are therein stated on the information of others they believe to be true.

Sworn to before me this 3d day of September, A. D. 1875.

ROBERT V. HUGHES, [SEAL.]
J. P., District of Columbia.

241 *Answer of Rebecca Mellen. Filed Nov., 22, '75.*

In the Supreme Court of the District of Columbia, sitting in Equity.

SUSAN L. WALLACH *vs.* JOSEPH C. G. KENNEDY, Trustee, CATHARINE Burche, Raymond W. Burche, Joseph C. G. Kennedy, Rebecca Mellen, and Elizabeth Hain.	No. 4423, Doc. 15. In Equity.

The separate answer of the said Rebecca R. Mellen, sued by the name of Rebecca P. Mellen, to the bill of complaint filed in the above entitled cause.

She admits as true the statements of facts contained in the first, second, & third paragraphs of said bill.

4. As to the fourth paragraph, she admits the borrowing of the

said $5,000 from her by said Susan L. and Catharine, at the time, and upon the terms therein set out, but has no knowledge of the manner in which they divided the sum between them, the
242 contract was a joint contract on their part, and she had no separate dealing with either of them.

5. She admits the execution of the deed of trust referred to in the fifth paragraph.

6. She admits the statements in the sixth paragraph.

7. As to the seventh, she says she has no knowledge of the facts therein set out. As to the eighth, she says she knows nothing; as to the ninth, she says she had no concern to know, and does not know out of whose money the interest was paid, but in point of fact the interest on the said loan was paid up to and including the January payment, 1873, after which only one-half of the interest was paid in April, July, and October of that year, leaving the other unpaid.

10. As to the tenth paragraph she knows nothing.

11. She makes the same answer to the eleventh paragraph, and the twelfth and thirteenth.

14. As to the fourteenth paragraph she says the state-
243 ments therein contained are false in substance and in fact, that there was no fraud intended or practiced by her in conjunction with said Catharine Burche or the said complainant as is therein stated and charged, nor was there any agreement or understanding between them to obtain any unconscientious advantage in favor of said Catharine or the said Susan L. To the contrary thereof, this defendant says she never saw the said Catharine until after the sale of the property mentioned in said bill; that one-half of the interest on the said loan falling due in April, July, and October, having fallen due and being unpaid, and she requiring the same for her support, she, through her authorized agent caused the same to be demanded from the said Susan L. and the said Catharine, treating it as it was originally made as a joint contract on their part, and having no knowledge of or interest in any contract or arrangement between them. Her agent failed to obtain payment of the said interest so due and in arrear, and she caused notice to be given to both of said parties that she must have the property sold, for the payment of this interest was essential to her support. Thereupon
244 the said Susan L. made a proposition to this defendant's agent, to the effect following, that the said property should be sold on fair and reasonable terms, and that she, the said Susan L., would purchase it at such sale, if she could; but there were certain liens upon it, which would have to be paid out of the purchase money, and which she could not meet, and this defendant would have to lend her the money to pay off these liens, which she supposed would exceed $——. If this was assented to by this defendant she would add to the $5,000 the amount of such further advance, and give a deed of trust on the property to secure this new loan with ten per cent. interest payable quarterly, yearly, and she would settle with her sister Catharine for her share. This defendant accepted this proposal; she, the said Susan L., requested the said agent not to

let her sister Catharine know anything of this arrangement, but this defendant, not thinking it just or fair to make such an arrangement with one of the sisters without communicating it to and giving the other sister a like opportunity, caused her said agent to submit the same proposal to the said Catharine, and she accepted it.

245 And after that with the consent of both of said parties, to wit, Susan L. and Catharine, the property was advertised and sold by the said trustee, and at said sale, as this defendant is informed and believes, and charges the same to be true, both of said parties by their respective agents bid at the said sale, and the said Catharine being the highest bidder therefor became the purchaser. After the said sale it was discovered that the liens on the said property instead of being about $——, in fact amounted to $——. This defendant not having so much money on hand applied to her mother, Mrs. Elizabeth Hain, to lend it to her, she agreeing to make the whole transaction in her mother's name, and thus to make her perfectly secure. This was done without the knowledge of the said Catharine, and without any communication with her directly or indirectly, and the sale was closed, and the money lent precisely on the terms, and in the mode proposed by the said Susan Lavinia Wallach, and agreed to by the said Catharine Burche, and by this defendant with each of them respectively, and not otherwise

246 or on any other term. And these facts this defendant offers to show and prove by incontestible proofs.

15. This defendant refers for her answer to this paragraph to her answer to the fourteenth, as she understands that covers this also.

16. She says in answer to this sixteenth paragraph that she has no personal knowledge of the facts and statements therein, and is advised that much of it is argumentative, and she does not admit the said facts and statements to be true as stated; but if they be true, she avers that the said sale was made with the full knowledge, consent, and agreement of the said Susan L. as hereinbefore stated, and the said purchase was made by said Catharine precisely on the terms proposed to this defendant by said Susan L. so far as the renewal of the loan, and so far as the addition thereto, and so far as the extension of time, and so far as the mode of security for the lender; and she is advised it does not lie in the mouth of complainant to contest that sale.

17. She has no knowledge of the matters in this paragraph.

247 18. She says the records referred to in this paragraph will afford her answer to it, and she has no personal knowledge in regard.

19. She prays that her answer to the fourteenth paragraph may be taken as her answer to this paragraph, adding thereto that in point of fact the said notes were immediately after their execution handed to the said Elizabeth Hain and have been held by her, and under her control ever since; for the accounts between the said Elizabeth Hain and this defendant have not been seetled; whether on such settlement the whole of the original of said loan of $5,000 will be found due to this defendant or whether the whole amount of said notes will so be found due to her, or whether a much less

sum she cannot now conjecture, for she cannot conjecture when such settlement may take place.

20. This defendant has no knowledge of and is not interested in the matters contained in the twentieth paragraph, and is advised it is not necessary for her to answer thereto.

248 21. She is advised it is not necessary for her to answer this paragraph, and she knows nothing of the matters therein.

And having fully answered she prays to be hence dismissed with her costs.

REBECCA R. MELLEN.

STATE OF PENNSYLVANIA, *Dauphin County*, } *to wit:*

Rebecca R. Mellen, whose name is signed to the foregoing answer in chancery, appears before me in her proper person and makes oath according to law that she hath read the said answer and fully understands the same, and that the facts therein stated as of her own knowledge are true; and she believes those to be true which are stated on information and belief.

Given under my hand and seal this the twentieth day of November, A. D. one thousand eight hundred and seventy-five.

[SEAL.] SIMON S. BOWMAN, *N. P.*

249 *Motion for Taking Testimony. Filed Feb.* 28, '76.

In the Supreme Court of the District of Columbia, sitting in Equity.

CATHARINE BURCHE and RAYMOND W. BURCHE *vs.* SUSAN L. WALLACH. } No. 3571. Eq. Doc., 13.

SUSAN L. WALLACH *vs.* CATHARINE BURCHE and others. } No. 4423. Eq. Doc. 15.

In these two causes Jos. H. Bradley, solicitor for the said Catharine Burche, suggests and shows to this honorable court that they are to every essential purpose cross-action relative to the same subject-matter and ought to be heard at the same time; that he has delayed taking testimony on the part of said Catharine to suit the convenience of the said Susan L., and has given notice to the solicitor for said Susan L. that he will now apply to the court for leave to take testimony within thirty days, on the part of said Catharine, to be used in the hearing of the said causes, respectively;

250 and he hereby moves the court to enlarge the time for taking testimony in the said causes, respectively, to the first day of April next.

JOS. H. BRADLEY,
Sol'r for Catharine Burche.

Order.

FEBRUARY 28, 1876.

On hearing this application the said Catharine Burche, a party

to the foregoing suits, is allowed till the first day of April next, inclusive, within which to take her testimony.

By the court. A. W.

251 *Testimony for Defendant. Filed Apr.* 24, '77

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH. } No. 3571. Equity Docket 13.

DISTRICT OF COLUMBIA,
County of Washington, } *ss:*

Be it remembered, that at an examination of witnesses begun and held on the 14th day of February, A. D. 1877, and continued from time to time, by adjournment within noted, until the 14th day of February, A. D. 1877, when the within deposition was taken, I, Edward C. Ingersoll, an examiner in chancery, did cause to be personally present at my office, No. 452 Louisiana avenue, in the city of Washington, in said District, the within-named witness to testify in a certain cause now depending in the supreme court of the District of Columbia, wherein Catharine Burche is complainant and Susan L. Wallach is defendant.

252 I, Edward C. Ingersoll, examiner in chancery, do hereby certify that, in pursuance of agreement of solicitors, the within deposition was taken down, and by me reduced to writing, in the presence of and from the statement of the witness at the time and place designated in the caption thereof, and was then and there by me read over to the witness, and by her subscribed in my presence, the witness having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

EDWARD C. INGERSOLL,
Examiner in Chancery.

253 *Testimony of Mrs. Mellen.*

WEDNESDAY, *February* 14, 1877.

Met to take testimony (in rebuttal.)

Present: Mr. Bradley, for complainant, and Th. J. Miller, Esq., for defendant, and Mr. L. H. Pike.

Whereupon RECECCA R. MILLER recalled for complainant, deposes as follows:

Q. In any of the conversations to which you have testified with Mrs. Wallach, or in any other conversations with her in which the proposition made in regard to the sale of the property and the purchase by her was discussed, did either Mrs. Wallach or her son Richard say that she, Mrs. Wallach, could not purchase without she (Mrs. Wallach) could raise sufficient money to pay off Mrs.

Burche's interest and so give you the first mortgage, and, of course, Mrs. Burche could not take the second mortgage?

A. No, sir, I did not hear Mrs. Wallach say anything about Mrs. Burche's interest, nor did I hear her son Richard so say.

254 Q. Did or did not Mrs. Wallach accept the proposition that if she would purchase at the sale you would advance to her so much money as was necessary to pay off taxes and other liens on the property, renew the old loan, and add to it these additional advances, and take a first deed of trust for the whole amount to be secured on the property?

A. Yes, sir, she did.

Q. Was her son Richard present at the time this proposition was made and accepted; and, if so, did he make any objection thereto?

A. I am not sure whether he was present on that occasion.

Q. Did he, at any time in your presence, and in the presence of his mother, make any objection to that proposition?

A. No, sir; he didn't make any to me that I know of.

255 Cross-examined by Mr. MILLER:

I think I had four or five interviews altogether with Mrs. Wallach.

Q. Where did they take place?

A. All at her house.

Q. When?

A. I haven't the particular dates; all the interviews were within a month and prior to the sale; I cannot say just how long prior.

Q. Did any of the interviews take place within one week prior to the sale or while the property was advertised to be sold?

A. The interviews were before the property was advertised for sale; I don't know whether there were any after the advertisement or not.

Q. Can you state whether there was any one interview
256 after the property was advertised for sale in the newspapers?

A. I call for the interest before the advertisement, but don't recollect whether there were any interviews after that or not.

Q. You state that you called for the interest; do you mean by that that the only occasion of your having these interviews was the collection of the one-half of three instalments of interest which were overdue and unpaid?

A. That was the only reason I had to call upon her.

Q. Who was present at these interviews besides you two?

A. I don't know of anyone, excepting my husband went with me once or twice.

Q. Was not Mr. Richard L. Wallach present at some of them; and, if so, how many?

A. I don't recollect.

257 Q. Did you have any interview with Mrs. Wallach at which Richard L. Wallach was not present; and, if so, how many?

A. I had three or four interviews with Mrs. Wallach; I don't know whether he was present or not; he might have been once.

Q. In any of the interviews you had with Mrs. Wallach, did you

inform her that you had an arrangement with Mrs. Burche to lend her so much money as was necessary to pay off taxes and other liens on the property, renew the old loan, and take a first deed of trust on the property for the whole amount in the event of her purchasing?

A. No, sir; I couldn't have told her that, for I did not see Mrs. Burche until after the property was advertised for sale, but I made the proposition to Mrs. Wallach.

Q. Did you ever see Mrs. Wallach after you had made such an arrangement with Mrs. Burche?

A. I don't think I made this arrangement with Mrs. Burche; Mr. Mellen made it, but not till after the property was advertised for sale.

258 Q. Mr. Mellen did it, with your knowledge and consent?

A. He did.

Q. Was Mrs. Wallach informed that Mrs. Burche would consent to her accepting the proposition which you made to her?

A. She was not; I don't recollect whether I saw Mrs. Wallach after the property was advertised.

Q. Did you see Mrs. Wallach after the arrangement had been made that Mrs. Burche might purchase on such terms as she subsequently did purchase?

A. I don't know how to answer such a question, because I am not certain that I saw Mrs. Wallach after the advertisement.

Q. Did Mrs. Wallach in any manner consent that Mrs. Burch might purchase on such terms?

A. I had no conversation with Mrs. Wallach about Mrs. Burche's purchasing, nor had I any correspondence with Mrs. Wallach on that subject.

259 Re-examined by Mr. BRADLEY:

Q. Do I understand you correctly that the proposition as to purchase to which you have testified was made by you to Mrs. Wallach before the advertisements of the property for sale and accepted by Mrs. Wallach, and the same proposition made by your husband by your authority to Mrs. Burche after the advertisement for sale and accepted by her, but you have no knowledge whether the fact of Mrs. Burche's having accepted it was or was not communicated to Mrs. Wallach?

A. You do.

By Mr. MILLER:

Q. You have testified in the course of your previous examination, and here again to-day, that a proposition was made — or *or* four times — Mrs. Wallach and accepted by her, which was identical with that afterwards carried out by Mrs. Burche, but I do not see that in the course of your testimony the language used in making that proposition to Mrs. Wallach has been reported otherwise than from counsel. Please state the language used in making the proposition.

260 Objected to, first, because the witness has not given any such testimony as has been imputed to her by the question. Second, there is no part of the evidence tending to show that the language used by the witness was suggested by counsel. Third, that the witness has been fully interrogated on this subject in her original cross-examination, and in her examination in rebuttal she has not stated anything which authorizes such a question.

Teste: INGERSOLL, *Exam'r.*

I said I had three or four interviews with her; I did not mean to be understood as saying that the proposition had been made three or four times. I told her that she could have a further loan to clear up the taxes, and give me a first deed of trust on the property. She was willing to do so, and said she would consider it for a week.

Question by Mr. Bradley,

Q. State whether you afterwards saw her, and whether she accepted or rejected that proposition?

A. I did, and she did accept; we talked the matter over again on this last interview.

R. R. MELLEN.

261 *Testimony. Filed Apr.* 24, '77.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE *vs.* SUSAN L. WALLACH. } No. 3571. Equity Docket 13.

DISTRICT OF COLUMBIA, *County of Washington*, } *ss:*

Be it remembered that at an examination of witnesses begun and held on the 23d day of March, 1873, A. D. 1876, and continued from time to time by adjournment within noted, until the 15th day day of May, A. D. 1876, when the within depositions were taken, I, Edward C. Ingersoll, an examiner in chancery, did cause to be personally present at my office, No. 452 Louisiana avenue, in the city of Washington, in said District, the within named witnesses to testify in a certain cause, now depending in the supreme court of the District of Columbia, wherein Catharine Burche is complainant and Susan L. Wallach is defendant.

262 I, Edward C. Ingersoll, examiner in chancery, do hereby certify that in pursuance of agreement of solicitors the within depositions were taken down, and by me reduced to writing, in the presence of, and from the statement of, the witnesses, at the time and place designated in the caption thereof, and were then and there by me read over to the witnesses, and by them subscribed in my presence.

The witnesses having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

EDWARD C. INGERSOLL,
Examiner in Chancery.

263 MARCH 23D, 1876.

Met to take depositions in this cause, and adjourned, by consent to a day to be hereafter agreed upon.

E. C. INGERSOLL, *Examiner.*

THURSDAY, *March 31st*, 1876.

Met pursuant to adjournment.

Present: Mr. Bradley, for defendant; and Mr. L. H. Pike, for complainant.

Testimony of V. Wiltberger.

Whereupon Verlinda Wiltberger, a witness of lawful age, residing in the county of Washington, D. C., produced, sworn, and examined on the part and behalf of the complainant in this cause, deposes and says:

I know Mrs. Burche and Mrs. Wallach, the parties to this suit; they are both my nieces; their mother was my sister; I recollect the fact of her (my sister) being stricken with paralysis.

Q. Do you know the fact of any arrangement having been
264 made between Mrs. Burche and Mrs Wallach after (Mrs. Hewitt) their mother was so stricken by paralysis in regard to provision for her comfort, nursing, and support? And, if so, please to state, as well as you can recollect, what that arrangement was.

A. I do know the fact of such an arrangement. The arrangement was that Mrs. Wallach, the defendant, was to take the whole charge of her mother's property, and assume the care and support of her mother out of the property. Mrs. Burche, the complainant, was to receive nothing from the property during her mother's life, as I suppose there was no time specified, nor was anything to be required of Mrs. Burche, only she was not to receive anything. Mrs. Burche was to pay one-half of the taxes then due to Mr. Todd.

Q. Do you know whether or not, after that agreement, Mrs. Wallach was in possession of the property, and whether she pro-
265 vided for her mother's comfort and support during her lifetime?

A. She had the property, and I believe cared for her mother's care and support.

Q. When that agreement was made was anything said in reference to the employment of a nurse for Mrs. Hewitt; and, if so, what was said on that subject?

A. I do not remember distinctly whether or not anything was said just at that time on the subject, but afterwards it was talked of and agreed to be necessary and proper.

Q. And who was it paid the expense of the nurse?

A. It was to come out of the property.

Q. Please to state what means of knowlege you have of the facts you have testified to?

A. Being with my sister while she was in Mrs. Wallach's
266 and from conversations with her, Mrs. Wallach. The agreement was made between myself and Mrs. Wallach, and agreed to by Mrs. Burche and her husband.

Cross-examined by Mr. PIKE:

Q. When the agreement to which you refer as having been made by and between you and Mrs. Wallach, and afterwards ratified or agreed to by Mrs. Burche and her husband, was Mrs. Hewitt's mental condition such as to enable her to understand and approve what was done?

A. No, sir; I think not.

Q. Did you make any attempt to determine whether she could so understand and approve?

A. No, sir; for we hadn't the least suspicion she could.

Q. What, if anything, had Mrs. Burche to do in regard to taking care of her mother under the alleged agreement?

267 A. She had nothing at all to do with it.

Q. Was the matter of Mrs. Hewitt's care and maintenance left wholly and exclusively to Mrs. Wallach under the alleged agreement?

A. Yes, sir; that was my understanding.

Q. Have you any knowledge of any consideration having passed between Mrs. Burche and Mrs. Wallach for the latter's assuming such exclusive care and maintenance of Mrs. Hewitt.

A. No, sir; none at all.

Q. Was Mrs. Wallach under the alleged agreement to be called upon to do more for Mrs. Hewitt or to be responsible for anything on account of the property beyond the income she actually received from the property?

A. I don't think anything of that was thought of or mentioned at the time, but afterwards Mrs. Wallach said to me that
268 suppose the income of the property was not able to cover its own expenses and her mother's. In that case I replied that Mrs. Burche would not be unwilling, I supposed, to bear her part. But this conversation between her and I was after the arrangement was made. We supposed all of us at the time that the income would be sufficient.

Complainant objects to so much of the answer as exhibits conversations between the witness and Mrs. Wallach after the agreement was made, as being inadmissible for any purpose in this cause.

Teste: INGERSOLL, *Exam'r.*

Q. Did the conversation between yourself and Mrs. Wallach, to which you have referred in your last answer, take place before or after Mrs. Wallach occupied the property?

A. I think it was before, but I am not certain.

269 Q. Was not the agreement between yourself and Mrs. Wallach in substance an agreement growing out of family relationships and interests; that Mrs. Hewitt in her prostrate condition should be cared for by some member of the family rather than entrusted to the care of a stranger, and did not the fact of your own and Mrs. Burche's residence in the country have some weight in the making of the agreement?

A. The agreement was made because we thought it proper for her to be with myself or her children, Mrs. Wallach or Mrs. Burche, and Mrs. Wallach we supposed to be the best, because she was here and nearer a physician—it was those kind consideration alone, and Mrs. Wallach seemed to be perfectly willing and ready to take her.

Q. As Mrs. Wallach was alone to bear the care and maintenance of Mrs. Hewitt, was it not left to Mrs. Wallach to get along with the property as best she could, and to be responsible to no one for the exercise of her judgment in regard to the whole matter?

270 Complainants objects to the question, as asking an interpretation of the agreement, to which she has testified, and therefore inadmissible.

Teste: INGERSOLL, *Exam'r.*

A. Certainly, sir; so far as the income of the property went.

Q. Was the agreement, of which you have spoken, reduced to writing?

A. I do not know; I never saw it so far as I remember.

Q. Not knowing that the agreement was reduced to writing, was not the agreement, as stated by you, in the answer to the second preceding question?

A. Yes, sir.

Q. Do you know what was the condition of the property as to needing or not needing repairs at the time Mrs. Wallach went into the occupation of it?

271 A. No, sir, I don't.

Q. Have you knowledge of Mrs. Wallach's having repaired the property by either carpenters or painters work? If so, please state what.

A. I have no knowledge of my own.

Redirect by Mr. BRADLEY:

Q. Do you know whether Mrs. Wallach did, or did not, occupy herself the principal or most valuable part of the property of Mrs. Hewitt during part of the time, and rent out and receive the rents for the rest?

Objected to by defendants counsel, as calling upon the witness for an expression of an opinion as to what was and what was not the most valuable part of the premises.

Teste: INGERSOLL, *Exam'r.*

A. Yes, she did.

272 Q. Do you know from any conversations with Mrs. Wal-

lach, or in any other way, what amount of rents she received from the property? If so, please to state.

A. I do not know and cannot state.

Q. Do you know whether Mrs. Burche after that agreement was made did not offer to Mrs. Wallach to take Mrs. Hewitt to her house?

Objected to, as irrelevant.

A. I don't know from my own knowledge or Mrs. Wallach.

Recross-examination by Mr. PIKE:

Q. Was it not a part of the agreement that Mrs. Wallach, with her family, she being at the time a married woman with children, should occupy the property as a home for herself and family, whilst so having the care and maintenance of Mrs. Hewitt?

A. There wasn't anything said on the subject at the time
273 the agreement was made. The property was under rent and Mrs. Wallach was living in another house, and the agreement was made with reference to the then state of the property.

Q. Did Mrs. Wallach take Mrs. Hewitt into her family for the purpose of giving such care and maintenance until she herself (Mrs. Wallach) went into the occupation of the property?

A. She did.

Q. Had Mrs. Wallach Mrs. Hewitt in her family at the time the agreement was made?

A. No, sir: she went into her family a week or two after the agreement was made; that is, as soon as she was able to be moved.

MRS. VERLINDA WILTBERGER.

Sworn to and subscribed before me, this 30th day of March, A. D. 1876.

EDWARD C. INGERSOLL,
Exam'r in Chancery.

274 Adjourned to a day to be agreed upon by counsel.

E. C. INGERSOLL.

THURSDAY, *April 6th*—2 p. m.

Met and adjourned to a day to be agreed upon.

Double Session.—E. C. I.

SATURDAY, *April 15th*, 1876.

Met pursuant to notice.

Present: Mr. Bradley, for defendant, and Mr. L. H. Pike, for complainants.

Testimony of D. F. Mellen.

Whereupon, DUSTIN F. MELLEN, of lawful age, residing in Millersberg, Pennsylvania, a witness produced and examined on part of complainant.

I know Mrs. Wallach and Mrs. Burche, parties to this suit; I am

the husband of Mrs. Rebecca R. Mellen; I know the fact of Mrs. Mellen having held a note secured by deed of trust upon property of Mrs. Burche and Mrs. Wallach, situated in the city of Washington; the first note was for $5,000.00; I know the property involved in this controversy; the first deed of trust securing Mrs.
275 Mellen was made to J. C. G. Kennedy, trustee.

Q. If you know, please to state how that first deed of trust was settled, and if you had any conversations with Mrs. Burche and Mrs. Wallach, separately or together, touching the settlement of that first deed of trust. Please state fully.

A. Two years ago last November, I came to Washington in order to make a settlement, and have the interest paid quarterly as it was named in the deed—if not, I should be obliged to sell the property. There was a difference between the two ladies about it, and that I always objected to knowing anything about. They both wanted to purchase, and in case either should purchase, I agreed that the loan should be renewed. Then I made this proposition to Mrs. Wallach, (on the occasion of my visit spoken of above,) at two separate times. That whichever should buy, the mortgage or trust must be the first on the property. If Mrs. Burche should buy, this
276 must be first, or if she, Mrs. Wallach, should buy, it should be first. The second time I called on Mrs. Wallach, Mrs. Wallach told me that it would require if she bought that an additional sum be added to the $5,000.00 sufficient to pay the taxes and assessments. I agreed to loan so much more as would pay all, which she said would be about $700.00. I had pretty much the same conversation with Mrs. Burche, and made her the same offer, it didn't make any difference which of them should buy the property. I saw them only separately, and not together, but I communicated the substance of the conversation of each on the subject to the other. Both consented to the proposition that I made as above. The money couldn't be had on the property on any other terms.

Do you know the amount of the liens on the property at that time which were to be paid off out of that additional loan?

A. The whole amount was $3,200.00, making the whole
277 loan $8,200.00.

Q. Do you, in point of fact, [know] whether the property was sold under that deed of trust?

A. I do; I was present and bid; a gentleman, who was a stranger to me, bid it off, as I understand, for Mrs. Burche.

Q. Did you know Mrs. Elizabeth Hain?

A. I did in her lifetime; she is now dead; she was the mother of my wife.

Q. After the purchase by Mrs. Burche, do you know whether or not the original loan of $5,000 made by your wife was renewed to Mrs. Burche, together with the additional loan of $3,200, of which you have spoken; and, if so, how was it settled?

A. I do know; the amount deposited with Mr. Kennedy, former trustee, that is, under the first deed, was $1,691.25; this additional to the original $5,000; my own bill for a month's trouble

278 here was $250; arrears of interest on original loan to Oct. 15, 1873, $187.50; additional interest, $429; interest from Oct. 15 to Dec. 22, $93.74; balance due Mrs. Burche, $973.22. These items, added together, make up the $3,200, which was the additional loan.

Q. Do you know in whose name the security for this new loan was taken, and, if so, why it was so taken?

A. The note was payable to Mrs Hain; Mrs. Mellen was trustee; it was so arranged that in case of selling the trustee's commissions would be saved.

Q. Do you know whether Mrs. Hain advanced any money for that additional loan or not?

A. She did; one thousand dollars; I gave my note for it jointly with Mrs. Mellen.

Q. Do you know where the $8,200 note is?

A. Mrs. Mellen has it; it was endorsed over to her by Mrs. Hain in her lifetime.

279 Cross-examined by Mr. MILLER:

I first knew Mrs. Wallach and Mrs. Burche when I came here to settle up the loan; prior to that my wife had loaned them money; I should say a year or two before the loan was secured by the property in question, interest payable quarterly; I can't tell you where that note is now; it was canceled and settled and probably left in the trustee's hands. The interest was at the rate of ten per cent. per annum.

Q. Up to October 15th, 1873, what amount of interest had been paid on that note?

A. The whole amount due; what it was I can't say.

Q. That note was to have run five years, was it not?

A. It was, 3 or 5.

Q. Don't you know that all interest on that note was paid up to January 15, 1873?

280 A. I cannot say; I had nothing to do with the collection of that interest.

Q. After the last full payment of a quarter's instalment of interest, was not one half of every other quarter's instalment of interest paid up to the time of the sale?

A. I can't say; I don't know.

Q. What knowledge had you that any interest was due at the time of the sale?

A. I was acting as the agent of Mrs. Mellen; I came here at her request?

Q. Then you did not know that these amounts of interest which you have testified to in chief were then due?

A. Only from information I had from my wife.

Q. Did you see the advertisement to sell the property under that deed of trust?

A. I did; I can't say in how many papers it was published

281 or how many times inserted. Ex. S. L. W. No. 2 I should

say was a copy of the advertisement. There was no postponement of the sale for any cause after the advertisement.

Q. What knowledge did you have that there was a difference between the two ladies spoken of by you as to this property?

A. From Mrs. Wallach the first time I ever saw her.

Q. What was the difference?

A. I can't say; there was very little said. I should judge there was a difference of opinion between them.

Q. Did not Mrs. Burche admit to you that she had not paid any interest for some quarters back?

A. As near as I can remember, Mrs. Burche claimed there was back interest not paid, but that Mrs. Wallach should have paid it, having all the income of the property. This is the substance
282 of my recollection.

Q. Who collected the interest?

A. Mr. Kennedy, I think.

Q. Did not Mrs. Burche admit to you that she had not paid any interest for some quarters back?

A. She did. I can't say for what length of time.

Q. Did not Mrs. Burche admit to you that Mrs. Wallach had paid one-half of every instalment of interest that had accrued?

A. I can't say. I have no recollection, but Mrs. Wallach so said to me.

Q. Did not Mr. Kennedy so also admit to you?

Objected to.

A. I can't say that he did or did not.

283 Q. Before the 8th of December, at 4 o'clock p. m., had you not agreed with Mrs. Burche that she might buy this property on other and different terms than those advertised as the terms of sale?

A. Never before or afterwards.

Q. Were not the only terms of sale offered to bidders those mentioned in Exhibit S. L. W. No. 2?

A. I know of no others.

Q. Did Mrs. Burche pay any cash for her purchase?

A. I can't say; I know nothing about what Mrs. Burche did with the money.

Q. Was not the only payment that Mrs. Burche made a note for $8,200.00, dated December 22, 1873, payable at 5 years after date, with interest at the rate of ten per cent. per annum, payable quarterly to the order of Elizabeth Haine, and secured by a first deed of trust on the property sold?

284 A. It was; that was what she gave.

Q. Was not that note for the amount of the

original loan	$5,000 00
and interest claimed to be due	285 43
and your own bill for trouble	250 00
and amount you sent to Mrs. Burche in cash	973 22
and the amount paid by you to Mr. Kennedy	1,691 25
All aggregating	$8,200 00

A. Yes, sir.

Q. Do you not know that that amount was secured by a first lien on the property sold?

A. Yes, sir; the last trust.

Q. Was not the whole of that money due to your wife, Rebecca R. Mellen?

A. It really was.

285 Q. At the time of the execution of that note was Mrs. Burche indebted to Mrs. Elizabeth Haine, or has she ever been since.

A. The papers show she was at the time, but the notes were afterwards endorsed to my wife.

Q. Was Mrs. Haine in Washington at that time?

A. She was never here to my knowledge.

Q. To your knowledge was Mrs. Burche ever indebted to Mrs. Haine in any sum?

A. No other way than the papers show.

Q. And, in point of fact, that money was due to Mrs. Mellen?

A. I suppose it was.

Q. You have testified that you knew the property involved in litigation in this case; is not [the] property improved by a large and substantial brick house?

A. It is old, but at the time it was built it was well built, and is a large house.

286 Q. At the sale, was not that property put up by the square foot?

A. It was; I bid a dollar a foot for it myself.

Q. At your interviews with Mrs. Wallach prior to this sale, state who were present, if anybody.

A. I do not remember of any one; if there was I could not call it to mind now, except my wife, who was present at my first interview with her.

Q. Was Mr. Richard L. Wallach present at either of those interviews?

A. He might have been, but I don't remember.

Q. You do not remember of seeing him there on either occasion?

A. I do not; I might have done so.

Q. In those talks with Mrs. Wallach, how much was she to have paid for this property if she bought it?

287 A. The property was not mine to sell; I couldn't say, as it was a public sale.

Q. Were you not advised that Mrs. Wallach would pay $20,000 for the property?

A. No, sir; I could not tell where the money was coming from, it was so hard to get the first.

Q. Were you not advised that Mrs. Wallach valued the property at $20,000, and was willing to sell at any bid above that?

A. I am quite sure Mrs. Wallach never said that to me; whether any one else did I don't know.

Q. Have you any distinct remembrances of all that occurred in your visit to Washington at that time?

A. No, I have not; the matters that would interest me the most I would have the clearest recollection of.

Q. Where did you stay?

288 A. The first 2 or 3 days at Willard's, and then on New York avenue, between 8th and 9th street, at a private house. I was here some 4 or 5 weeks altogether.

Q. What other business had you to occupy you while you was here?

A. Not any especial business.

Q. What else occupied your time?

A. That's a hard question to answer; I can't tell.

Q. Are you positive that you saw Mrs. Wallach only 2 or 3 times?

A. It might have been more; I'm not positive.

Q. Were either of those times after the sale?

A. I'm quite sure not.

Q. Did you not, after learning that the default in payment of interest had been made by Mrs. Burche only, profess very

289 friendly feelings for Mrs, Wallach, and suggest that at a sale which you felt compelled to order that you would renew to her the loan on the property in case she should purchase?

A. I did.

Q. Did she not then, or afterwards, and before the sale, inform you that it would be impossible for her to enter into such an arrangement, because a first lien on the property would have to be retained in order to secure to her sister, Mrs. Burche, her part of the purchase money?

A. She did not.

Q. Why was not the arrangement made and consummated with Mrs. Wallach; that is to say, the same arrangement that was made with Mrs. Burche?

A. I proposed the same arrangement to Mrs. Wallach, either one purchasing; that is, Mrs. Wallach or Mrs. Burche; I would renew the loan on the first trust, whichever purchased. Mrs. Wal-

290 lach did not bid the property off. I proposed to make an additional loan to Mrs. Wallach sufficient to pay taxes and assessments.

Q. Where did you see Mrs. Wallach?

A. At her house.

Q. Nowhere else?

A. The day of the sale and before the sale she was in the office of J. C. G. Kennedy. I think that was the last time I ever saw Mrs. Wallach.

Q. Did you have a talk with her there?

A. No, I did not; I just passed the time of day.

Q. Who was present in his office at the time?

A. Mrs. Wallach, Mr. Kennedy, and myself, are all that I recollect.

Q. Was not Mr. Richard L. Wallach there?

A. I couldn't say that he was or was not.

291 Q. Did not Mrs. Wallach on that occasion explain to you

or within your hearing that the consummation of such an arrangement as you had proposed would be a fraud on her estate, to which she could not be a party?

A. She did not; I was not there 5 minutes.

Q. Did she not propose to you, or within your hearing there, that the first deed of trust or the first instalment of the purchase-money should be applied to satisfy the claims of her sister, Mrs. Burche, against the property?

A. Not to me or within my hearing.

Q. During the whole time you were in the city, did you not see a card on the house, "For sale, inquire within"?

A. I think I did, if my recollection serves me right?

Q. Did you not learn that Mrs. Burche valued the property at, and would not consent to a sale thereof at less than,
292 thirty thousand dollars.

A. Never knew she placed any value on the property of any amount, to my knowleege; she never has said anything to me of the valuation of it or the price of it.

Q. When did Mrs. Hain die?

A. Sometime in November or October, 1875: I was south at the time.

Q. Where did she reside?

A. Near Millersberg for a year and a half prior to her death, and before that at Williamstown.

Q. In reply to a former question you testified that you did not know "that Mrs. Wallach would pay twenty thousand dollars for the property." "I could not tell where the money was coming from; it was so hard to get the first;" please state what difficulty you had in getting the money from her.

293 A. To make a sale of the property.

Q. Was not Mrs. Burche liable also for the debt for which the sale was made?

A. It is a joint note; both would be equally liable.

Q. Had you not satisfactory evidence that Mrs. Wallach had paid one-half of every part of said debt which had become due to that time?

A. I can't say as to that; and in addition I do say, if the interest had been paid it would not have been necessary to make a sale.

Q. Did not Mrs. Wallach show you receipts from Mr. Kennedy, the trustee under the deed of trust and the agent of your wife, in in the presence of Mr. Richard L. Wallach, for one-half of all the interest that had accrued.

A. I don't remember that she did; it was the whole interest I was after.

294 Q. Were you not advised that Mrs. Wallach and Mrs. Burche each received one-half of the five thousand dollars originally loaned, and that each was to pay one-half of the interest to accrue, by an arrangement made between them?

A. You are asking me questions I know nothing about.

Q. Were you not so informed by the parties to this suit, or by any other?

A. Not to the best of my knowledge.

Redirect by Mr. BRADLEY:

Q. You have stated in your cross-examination the mode of the settlement of the purchase of this property by Mrs. Burche; now state, if you please, whether it differed in any manner from the agreement made between you and Mrs. Burche and Mrs. Wallach respectively, as testified to by you in your examinationn-in-chief, or whether it carried out specifically the terms of that agreement.

295. A. It did not differ in any manner from the agreement I made with each of them; it carried out specifically the terms of that agreement.

Q. Did you at any time before, at the time of, or after the purchase by Mrs. Burche, make any other or different terms with her as to the said purchase than those which you have already agreed upon with Mrs. Wallach in case she should become the purchaser?

A. I did not.

Q. You have stated in your cross-examination that Mrs. Burche gave the first deed of trust after her purchase to secure the amount of the original loan, five thousand dollars, and the additional loan of three thousand two hundred dollars to secure Mrs. Mellen. State whether or not it was part of the original agreement made by you with those two ladies, respectively, that Mrs. Mellen was to have the first deed of trust of the property to secure those two amounts, whichever of them might be purchaser.

296 A. It was the same with either; Mrs. Mellen was to have the first deed of trust, if either of them purchased.

Q. Do you remember when this subject of purchase by Mrs. Wallach was first mentioned in your conversation with her, whether she did or not enjoin upon you not to let Mrs. Burche know anything about it?

Obj. to.

A. I do not recollect that, but I have a recollection of giving her a week's time to consider what she would do.

Q. Have you any interest in the event of this suit, or is it your wife's separate property that is involved?

A. I have not one dime; it is her separate property.

Re-cross, by Mr. MILLER:

Q. Did Mrs. Wallach agree to give you two hundred and fifty dollars for your services in the matter?

A. She did not agree to give me anything. She could not [have] had the money on any other conditions.

297 Q. Was Mrs. Wallach to have had paid over to her in cash $973.23 out of the new loan?

A. I agreed to furnish just money enough to pay off the indebtedness on the property over and above the first loan, which amounted to $3,200.

Q. Was Mr. Kennedy to receive out of this new loan $1,691.25?
A. It was paid over to him as trustee.
Q. When did you agree that the whole loan should aggregate $8,200.00?
A. As soon as the account of the indebtedness on the property was made up.
Q. Did you know before the sale where Mrs. Burche was to get the money to purchase the property?
A. I have stated previously that I would make the loan to either; that I would be obliged to furnish the money.
298 Q. Was it not arranged that your wife was to advance the money?
A. It was, and I was her agent.

DUSTIN F. MELLEN.

Sworn to and subscribed before me, this 15th day of April, A. D. 1876.

EDWARD C. INGERSOLL, *Exam'r.*

Adjourned to Monday, 17th inst., at 10 o'clock a. m.

INGERSOLL, *Exam'r.*

299 *Double Session.—E. C. I.*

MONDAY, *April* 17*th*, 1876.

Met pursuant to anjournment.
Present: Mr. Bradley for complainant and Mr. Miller, defendants.

Testimony of R. R. Mellen.

Whereupon Rebecca R. Mellen, of lawful age, residing in Millersberg, Pennsylvania, a witness produced, sworn, and examined on the part and behalf of the complainant, deposes as follows:

I am the same person that is called Rebecca P. in these proceedings. Mr. Jos. C. G. Kennedy negotiated the first loan of $5,000.00 with Mrs. Wallach. I first saw Mrs. Wallach when there was a default of interest. The first interview I think was this: She spoke something about selling, and asked me if I would purchase. I first asked her for the interest, and she said she hadn't it, and that she had been thinking about selling. She fixed no price on the property. I told her she had better buy it if it should be sold. I talked of selling under the trust. I proposed to her that she could
300 have the money longer it she paid the interest promptly. Then she said there was more money needed for taxes and to pay expenses. I said she could have enough for that too if she would give a first mortgage to secure it all. Then she requested me to wait until Tuesday following, when she said she would pay the interest or let me know what she would do then. But that in the meantime I should not make the proposition to Mrs. Burche if I should see her. I had never up to that time seen her. There was no one with me at this interview. Mrs. Wallach was then living in the property that the trust was on. I called again on the Tues-

day, I think, with my husband, and asked her for the interest. She said she couldn't pay, and that I should foreclose; that is, I would have to order Mr. Kennedy to do so.

Q. At that interview on Tuesday was any reference made by either of you or by your husband to the proposition which you had made to her to renew the loan of $5,000.00, and lend her such
301 money as would be necessary to pay the taxes, interest and expenses and special assessments?

A. My husband did most of the talking after this point; I think it was referred to by them; at that time I had never seen Mrs. Burche; I never saw her until after the property was advertised for sale, I think. My husband made a proposition to Mrs. Burche about buying the property when I first met her; this was after the same proposition was made to Mrs. Wallach. I had nothing to do with the details of the settlement of the purchase; that was all attended to by the trustee.

Cross-examined by Mr. MILLER:

There was no one present, I think, at the first interview with Mrs. Wallach; I don't think Mr. Richard L. Wallach was present either the first or second interview; there was one time when he was present when Mr. Mellen was also present.

302 Q. At the time of your first interview with Mrs. Wallach, were you not satisfactorily advised that Mrs. Wallach had paid one-half of all the interest that had become due?

A. It was a joint note, and I looked for the interest, the whole of it.

(Question repeated.)

A. I don't recollect of any such thing.

Q. Who collected the interest for you?

A. Mr. Kennedy, my agent.

Q. Had you not received one-half of every instalment of interest that had become due?

A. I always received the quarterly interest when I received it.

Q. Did you never receive a part of any quarter's interest at a time?

A. I don't recollect.

303 Q. Did not Mr. Kennedy inform you that Mrs. Wallach had paid her half of all the interest that had accrued?

A. That I don't recollect.

Q. At your first interview you have stated that Mrs. Wallach had informed you that there was more money needed for taxes and to pay expenses. Did she state what these expenses were, and what the total would amount to?

A. I don't recollect that she did to me, but she did to my husband, and in my hearing. I can't state the amount. I know it afterwards amounted to more than she stated at the time.

Q. What were the expenses that she explained to your husband?

A. Taxes, street improvements, commissions, and other expenses for selling.

Q. Did she not propose to borrow enough from you to pay for the moiety of the property which belonged to Mrs. Burche?

304 A. I don't recollect anything about that; she proposed to have money enough to pay the expenses, taxes, &c.; there was nothing said about it.

Q. How many interviews did you have with Mrs. Wallach altogether?

A. I think, to the best of my knowledge, about four or five.

Q. At how many of them was your husband present?

A. One or two; I am not certain which.

Q. Did not Mrs. Wallach inform you, at any of those interviews, that she could not purchase the property and give you a first lien thereon unless you advanced her sufficient money to pay for Mrs. Burche's moiety?

A. No, sir.

Q. What do you mean by saying, in answer to a former question, "I know it," meaning the amount of taxes and expenses,

305 "afterwards amounted to more than she stated at the time"?

A. She supposed it would be somewhere about $700.00; it was more; it amounted to $3,200.00.

Q. When did you ascertain it amounted to $3,200.00?

A. When we were going to take the trust.

Q. Was that before or after the sale?

A. After the sale. I did not advance any money to Mrs. Burche before the sale nor after, but we paid the money to the trustee.

Q. When you asked Mrs. Wallach for the interest over due, did she not refer you to Mrs. Burche, and tell you it ought to be paid by her?

A. She may have said that; I think she did.

Q. Did you demand it from Mrs. Burche?

306 A. No, sir; I did not. I don't think I did, because I never saw Mrs. Burche until after the advertisement of the sale?

Q. At your first interview with Mrs. Wallach, was not her proposition that you should lend enough money to the then owners of the property to pay off the prior encumbrances?

A. There was nothing said to that effect, except the taxes and expenses to be included in the first mortgage, whoever purchased; that is, if she purchased, for at that time there had been no conversation with Mrs. Burche on the subject of purchase.

Q. When you came to Washington at that time, did you not ascertain that the security of your mortgage was impaired because of the non-payment of taxes and special assessments.

A. I had heard that there were taxes and assessments unpaid, but I did not think that affected my first mortgage.

307 Q. How had you heard it?

A. I don't now know the source unless it was the agent. I don't from any one else.

Q. Were you not desirous to have these paid, and for that purpose willing to lend sufficient money to Mrs. Wallach, and Mrs. Burche jointly?

A. I was not willing to advance more money unless they were paid.

Q. You are and always have been the owner of the note for $8,200.00 of Mrs. Burche, payable to the order of Elizabeth Hain?

A. Not always, it has been endorsed over to me.

Q. Was not all the money lent to Mrs. Burche yours?

A. All but one thousand dollars, and that we settled before my mother died, and she endorsed the notes over to me.

308 Q. Did not your mother lend you that one thousand dollars on the joint note of yourself and husband?

A. I don't now know. The thousand dollars that I got from mother was really lent to me, and I repaid her without reference to the note of Mrs. Burche's.

Q. Who administered on your mother's estate.

A. George W. Hain, Williamstown, Dauphin county, Pennsylvania.

R. R. MELLEN.

Sworn to and subscribed before me, this 17th day of April, 1876.

E. C. INGERSOLL,
Exam'r in Chancery.

309 *Testimony of Jos. F. Kelly.*

JOSEPH F. KELLY, a witness of lawful age, residing in the city of Washington, produced, sworn, and examined on the part of the complainant in the above cause, deposes as follows:

I have resided in Washington upwards of 20 years; I was engaged in the real estate business in 1874, and some eight or ten years prior thereto, and ever since; I know the property in controversy in this suit, and have known it ten or fifteen years; in my judgment the value of that property in the fall of 1874 was fifteen to sixteen thousand dollars; I was employed in the fall of 1874 by J. C. G. Kennedy, trustee, to sell it; I sold it. There was a very fair company at the sale; I proposed at first to sell it as a whole; Mr. Walter Lennox suggested to me that it would sell better by the foot; I had observed Mr. Lennox in conversation with Mr. Richard L. Wallach just before this; I called Mr. Kennedy, the trustee, and Mr. Kennedy and Mr. Lennox had a talk in my presence and they agreed that I should put it up by the foot.

Conversations with Mr. Miller objected to by Mr. Miller.

310 I then put it up by the foot and sold it by the foot; Mr. Lennox was an attorney-at-law; there were six or eight bidders in all; Jesse B. Wilson was one, Mr. Wallach was one, Clagett was one, Columbus Alexander, I think, was one; there were two others that I did not know; it started at $1.25 per foot; it was spirited until it went up to about $2.25 per foot; at 2.25 I took 2½ cents bids until it went up to $2.47½, which was Jesse B. Wilson's bid; the next bid was Mr. Clagett's, $2.50 per foot; then Mr. Wallach bid $2.55, then Mr. Clagett made it $2.57½; I dwelt a long

time and tried one cent, ½ cent, ¼, and ⅛ cent; I couldn't get any more bids and I knocked it down to Mr. Clagett at $2.57½ per foot; Mr. Fox, my clerk, did all the writing and paid all the taxes and settled up the matter for Mr. Kennedy, the trustee.

Q. Was there any objection made by any one to your setting up the property by the square foot? And, if so, state by whom that objection was made.

311 A. There was no objection made by any one; Mr. Clagett told me he bought the property for Mrs. Burche, and it was put down to Mrs. Burche, and it was so recorded in my book of sales.

The sale took place on the premises; I don't know who was residing in the house at the time.

Cross-examined by MILLER:

I have known the property mentioned in the proceedings a long time. It is an old-fashioned brick house, three-story. The kitchen is in the basement or cellar part rather. The second story is a parlor, and a room back of the parlor, and it has a back building. There is a two-story addition on the south side of four rooms, communicating with the main house.

I have sold considerable property at auction in Washington.

Q. Is it usual to sell property as valuably improved as this by the square foot?

A. Yes, sir.

312 Q. Have you sold property as valuably improved as this by the square foot at any other time?

A. I have, and sold it by the lump just as I was requested to sell.

Q. Will you state any instance where you nave sold any property as valuably improved as this by the square foot?

A. I have sold property on 18- St., between I & K Sts., since that sale, five houses and lots by the square foot, as valuably improved in proportion as that—this was in November, 1875. Upon referring to my record, I find these houses were sold by order of court for James McSherry, guardian. I have my last memorandum book of auction sales with me. I have another one prior to this. My last book commences in April, 1873, and contains account of all sales made by me as auctioneer since then. The Nos. of those houses I sold between I & K Sts. were 910, 912, 914, 916, and 918. The first lot sold at $1.38 per square foot, amounting to $3,592, the next two $2,214.54, $2,762.10. They were eleven and twelve

313 feet front; the total amount of sales $8,569.47. Some of these lots were only 81 cents per square foot. The improvements on these lots were shanties occupied by colored people generally. This is the only sale I find on this book (the last) of improved property being sold by the square foot. I can't recollect now of another instance, but I know I have sold some. I am also a collector of rents. A large portion of my business consists in collecting rents. From the time of the sale I have been the agent of Mrs. Burche in collecting the rents of this property. Through the winter the monthiy income from rents of the property is $158.66,

and through the summer $133.66, the average monthly income is about $145.00. The fall of 1873 was no worse time than now to sell property. I don't think it was as bad as it is now. I don't think Mr. Clagett made any deposit at the sale. I know he didn't when he told me he bought it for Mrs. Burche. I didn't care about the deposit, because Mrs. Burche was one of the heirs.

314 Q. Did you know before the sale that Mrs. Burche had an arrangement with the trustee and the parties secured thereby for the purchase of the property?

A. I did not.

Q. When did you first learn that they had?

A. I Never knew they had.

Q. Did Mrs. Burche pay any money into your hands?

A. She did not.

Q. Did Mrs. Burche put into your hands two notes for any part of the purchase that were secured by a deed of trust on the property?

A. She did not.

Q. When you give notice of terms of sale, as in this case, is it not generally understood that the deed of trust to secure the deferred payments is to be the first on the property?

315 Objected to, as irrelevant.

A. That depends on circumstances.

Q. Is it so always, except when the sale is made subject to a prior deed of trust?

Same objection.

A. It is always presumed that they get the first deed of trust.

Q. Did you ever know any other case than this, where it was otherwise?

Same objection.

A. I never did; I didn't know Mr. Lennox was dead.

Q. Did you give any notice of other terms of sale than those advertised to the bidders.

A. Not that I am aware of.

Q. When were you first authorized to take Mrs. Burche's bid without any deposit?

316 A. I don't recollect that I asked her for any deposit, or that Mr. Kennedy suggested anything about it.

Q. Do you keep this property insured?

Objected to.

A. I don't keep it insured. My impression is that Jesse B. Wilson bid $2.47½ per sq. foot; I am pretty sure he did, and I tried a long time to get him to go higher; I am positive he put in three or four bids. There are two little wooden shanties on the rear of the lot on D street.

Redirect by Mr. BRADLEY:

The house was in bad condition at the time of sale, and I have

spent five or six hundred dollars in repairs since, as the agent of Mrs. Burche; the cellar was very damp and we had to excavate some and put in an area wall in front and put a new roof on part of the house. The addition was not of the same character of building as the main house. There was considerable vacant
317 ground outside of the ground covered by the house; this ground was on the south side.

Q. What reason did Mr. Lennox assign for requesting it to be sold by the square foot instead of by the lump?

Objected to.

A. On account of the vacant ground on D street.

Q. Did Mr. Lennox profess to be acting for anybody?

Objected to.

A. He told me he was a friend of Mrs. Wallach.

Q. Had or not rents in this city fallen at the time you became the agent of Mrs. Burche?

A. Yes; rents were tumbling down then, and are not as high now as they were then. It was about two months after the sale before I began to collect any rents for Mrs. Burche. Mrs. Wallach occupied the main house during the two months; I got the
318 rents from the addition and the shanties from the day of sale.

Q Was there any alteration in the terms of sale, except by the manner of the settlement between Mrs. Burche, and the trustee?

A. No, sir.

Re-cross:

Q. You testified that the house was in bad condition at the time of sale, would it have rented for so much before the sale, as it would after it had been repaired?

A. I don't think it would, at least I could not have rented it for so much.

Q. Among the repairs for which you spent five or six hundred dollars, was there included the cost of altering the south wing of the house?

A. I don't think there was any alteration of the south wing, I think there was a door there cut at the tenant's expense. The new roof was put on the whole of the sonth wing of the house.

319 Q. Had you any ground for believing that Mr. Lennox was the authorized agent of anybody at that sale?

A. I thought so; I saw him and Mr. Wallach in consultation before he spoke to me on the subject.

Q. Did you see Mr. Wallach conversing with anybody else there?

A. I don't recollect.

Question by Mr. BRADLEY:

How long before Mr. Lennox spoke to you did you see him conversing with Mr. Wallach?

A. He came right direct from Mr. Wallach to me.

JOS. F. KELLY.

Sworn to and subscribed before me, this 17th day of April, A. D. 1876.

EDWARD C. INGERSOLL,
Examiner in Chancery.

Adjourned to Monday 19th inst., at 11 o'clock, a. m.

INGERSOLL, *Examiner.*

320 *April 19th Double Session E. C. I.*

Met pursuant to last adjournment.

Present: Mr. Bradley for complainant and Mr. Miller for defendant.

Testimony of J. C. G. Kennedy.

Whereupon Jos. C. G. Kennedy, of lawful age, a witness produced, sworn, and examined on the part and behalf of the complainant in the above-entitled cause, deposes and says:

In 1872, '73, '74, & '75 I was connected with real estate matters in this city, and have been for twenty years past; I know the parties to this suit and the witnesses Mr. and Mrs. Mellen; in the year 1873 I negotiated a loan for Mrs. Wallach and Mrs. Burche on property involved in this cause; I was trustee in the deed of trust; I remember the fact of the sale of that property by me as trustee; it was sold on account of the failure of the parties to pay interest; I made a demand for the interest from both parties before the sale; I had several interviews with Mrs. Wallach before the sale was made, and after the interest was due and unpaid; she came
321 to my office to see me, and also her son, as I think I informed her at all the interviews that I would have to sell unless the interest was paid, and I notified her to that effect in writing also; Mr. Kelly conducted the sale for me as auctioneer.

Q. Did she, at any of those interviews, or at the sale, make any objection to the sale?

A. I do not recollect much on that subject; if I was to say what my impression is, my impression is that both parties, Mrs. Wallach and Mrs. Burche, said go on and sell, and that will settle our title to the property; my opinion is that they both wanted the property [which] was sold, and I think in the failure to pay interest there was no allegation of inability to pay, but an indisposition to have the property remain in joint tenancy, and that both looked pleasurably at a sale; neither of them wanted to procrastinate the sale, and neither of them interceded to postpone it; both parties spoke to me about raising funds in the event of either of them purchasing it.

322 Q. At the sale do you remember the fact of its being sold by the square foot, and the reason for so doing?

A. The reason for so doing was that it seemed more agreeable to

all parties; it was suggested by some one, either Mr. Wallach or Mr. Lennox, or some one that I thought at the time was in Mrs. Wallach's interest, that it should be sold by the square foot in place of the lump. I think it was at first put up in the lump, or was to have been.

Q. With whom did you settle for the purchase as trustee?

A. I think with Mrs. Mellen, the creditor; she advanced more money to the purchaser, not through me, I think.

Q. Didn't Mrs. Mellen furnish you the money and you settle with Kelly upon the bills he produced?

A. I presume she did; Kelly, I know, made out the whole statement of the matter. I think Kelly paid the taxes, &c.; my
323 recollection is not distinct. The sale took place in front of the premises in question, on the corner, on the pavement. They were then occupied by Mrs. Wallach, but I can't say whether she was present in the house or not.

Q. Was the price obtained at that sale for the property a fair and reasonable price, or more or less, from your knowledge of property in the city, than you expected to get?

A. I thought it a very fair sale.

Cross-examined by Mr. MILLER:

I was not the agent of Mrs. Mellen to collect the interest any more than this, if the interest had been paid me I should have paid it over as I do in other cases where I'm trustee. I had no power of attorney from Mrs. Mellen to act as her agent.

Q. Did you not collect all the instalments of interest that were paid?

324 A. I know some were paid, I don't know how many.

Q. At the time the original loan was first made, did you have the money in your hands and pay it over to the parties?

A. I had not the money in hands, though it passed through my hands by check, I presume; I can't now recollect to whom the money was paid, and I can't recollect whether I paid any part of it to Mrs. Wallach or Mrs. Burche. I cannot recollect when I first saw Mrs. Wallach or Mrs. Burche about this original loan of money.

Q. Was not the whole negotiation made through Frederick Koones, and did he not only see the parties and settle up the liens on the property and pay over the balance to them?

A. It might be, I do not recollect. I cannot say whether I had seen Mrs. Burche and Mrs. Wallach on the subject prior to the execution of the deed of trust to me or not. I think they had talked to me. It is my custom to deal as much as possible with
325 principals.

Q. How was the interest that was paid to you on that loan, paid to you; by whom, and in what manner?

A. I can't recollect; (witness is here shown a receipt which he identified as signed by him, and the same is here filed and marked Exhibit J. C. G. K. No. 1, Ingersoll, Examiner.) I can't say who paid the money to me.

Q. Subsequently to this receipt did not Mrs. Wallach pay to you one-half of every instalment of interest that became due on the loan before the sale?

A. I cannot remember. If she did I must have given her receipts for it which can [be] produced. (Witness is here shown memoranda purporting to be receipts which he recognizes as given and signed by him and the same are here filed and marked Exhibits J. C. G. K., Nos. 2, 3, 4, 5 and 6, respectively. Ingersoll, Examiner.)

326 Q. Do you now recollect that Mrs. Wallach was not in default for any interest on this loan?

A. My memory will not enable me to say. They were both liable for the whole, and upon that principle she was in default. I think when the loan was made it was understood that each was to pay half of the interest, but that was between them and no part of the contract.

Q. In the terms of sale, as advertised, "that $5,000.00, with interest thereon from January 15th, 1873, should be paid in cash," was that much due to Mrs. Mellen at the time?

A. I would infer so from the advertisement.

Q. Was that paid to Mrs. Mellen?

A. I was furnished with Mrs. Mellen's receipt for it; I don't know whether money passed; I think all the arrangements were made by the parties—not in my office—and a new loan was made.

327 Q. Did you obtain from the purchaser notes at one and two years at 8 per cent. interest, secured by a deed of trust on the property?

A. I received the notes; I don't remember the expenses of the sale; I have the notes with me here; they are dated 24th December, 1873; each is for $2,204.00.

Q. The note and interest would amount to less than six thousand dollars—these notes amount to $4,408.00 principal—did the property only sell for about 10 (ten) thousand dollars?

A. It sold for much more than that.

Q. How was the surplus applied?

A. I would have to refer you to Mr. Kelly.

Q. Did you get a commission as trustee for selling that property?

A. Yes, I did; if I haven't collected it, it is my own fault; I cannot say what the commission was; I think I did not charge

328 full trustee's commissions provided for in the deed, though full commissions may have been accounted for in the settlement.

Q. Do you mean by stating that full commissions may have been accounted for in the settlement that Mrs. Wallach was charged full full commissions?

A. The charge would be to them both; there was no separate account.

Q. Have you ever made a statement of account of the sale?

A. I did not; that was made out by Mr. Kelly; after the settlement was made I notified Mrs. Wallach by letter of the remainder

in my hands subject to her order, and I never received any acknowledgment from Mrs. Wallach that she had received this letter.

Q. Did you send Mrs. Wallach a copy of your account of sale?

A. I think I did; I couldn't say; these notes referred to
329 are payable to my order as trustee; nothing has been paid on account of either of them; I have not made any demand because Mrs. Wallach had not authorized me to act for her.

Q. Was payment of those notes ever tendered you?

A. No.

Q. Are those notes secured by a first lien on the property sold?

A. So I infer.

Q. Do you know after the conveyance whether she did or not execute a deed of trust purporting to secure to one Elizabeth Hain $8,200.00, which deed of trust was executed and recorded subsequent to the execution of the conveyance to Mrs. Burche by you, and prior to the execution or record of the deed of trust to secure these notes for the deferred purchase notes?

A. I know nothing about it.

330 Q. Do you not regard it your duty, as trustee, to see that the mortgage securing the deferred purchase money shall be a first lien on the property sold?

A. No, sir; I consider it my duty to take the obligation of the purchaser as near the same moment as possible to the execution of the deed, and place them at the same moment on record or as soon after as practicable.

Q. Did you do that in this case?

A. My impression is I did, by himself or by directions.

Q. At one of the interviews you had with Mrs. Wallach at your office, was Mr. Richard L. Wallach and Mr. Mellen present?

A. I don't remember.

Q. Did you hear Mrs. Wallach, or Mr. Wallach for her, say in reply to Mr. Mellen's proposition that she, Mrs. Wallach, should buy the property, that she, Mrs. Wallach, could not raise the money to do so?

331 Objected to.

A. Inasmuch as I do not remember the interview, I can't recollect it.

Q. Has any part of your commission been paid?

A. A portion paid—it has all been paid, but I haven't realized it all. Can't say how much; but I gave an acquitance for it all.

Q. You stated in reply to a former question that if you chose to take "cats and dogs in payment of my commission, it was my own concern," what was it you got for your commissions in this case?

A. Money and note, a note that I believed to be good, a real estate note endorsed by Mrs. Mellen.

Q. Did you get one of the notes of Mrs. Burche?

A. I did not. I got a note made by Mary Anderson and endorsed by Mrs. Mellen. Mrs. Mellen had paid the money
332 for it, and I took it as money. No one else endorsed it. I

think the note is about $350.00. I have no idea what the cash payment on account of commissions [was].

Q. Was any one present when Mrs. Wallach said go on and sell, and that will settle the title to the property?

A. I don't remember any particular occasion when that was said.

Q. Was not Mrs. Wallach at your office on the day of the sale begging you to postpone the sale, in order that she might have an opportunity to raise money that she might buy the property?

A. I have no recollection of any such circumstance at that period or at any particular period; my only recollection is that they were both reconciled to a sale.

Q. Did anybody but Mr. Lennox advise that the property should be sold by the square foot?

333 A. I have not said that Mr. Lennox did, but have given it as my impression that Mr. Lennox or Mr. Wallach suggested that [it] would sell better if sold by the foot. When that suggestion was made those interested were conferred with, and there was a harmony of opinion that to sell by the foot would be the better way.

Q. Was Mrs. Wallach consulted?

A. Not personally; that is my recollection.

Q. Was she on the ground?

A. I do not remember to have seen her that day.

Q. Was Mrs. Burche consulted?

A. I could not say.

Q. Whom do you mean by the persons interested?

A. Parties present at the sale, those who were interested
334 in their affairs. I mean particularly those whose property was being sold.

Q. When did you instruct the auctioneer to *to* take Mrs. Burche's bid without the deposit, $250, required by the advertised terms of the sale?

Objected to, because the question assumes that the witness has so stated when he has not.

A. I have no recollection of giving such instructions.

Q. Did you know the deposit was not made by Mrs. Burche?

A. I did not and do not now.

Q. Did Mr. or Mrs. Mellen hand to you $1,691.25 for Mrs. Burche?

A. I do not recollect.

Q. Who did the conveyancing after that sale?

A. Mr. Kelly, I presume, because Mr. Kelly was acting as the agent of Mrs. Mellen in this last transaction.

JOS. C. G. KENNEDY.

Adjourned to Friday, at 11 a. m., 21st inst.

INGERSOLL, *Exam'r.*

335 *Deposition of A. F. Fox.*

FRIDAY, *April* 21*st.*

ALBERT F. FOX, of lawful age, a witness produced, sworn, and

examined on the part and behalf of the complainant in the above-entitled cause, deposes and says as follows, to wit:

I reside at 805 I street N. W., and am a clerk in Joseph F. Kelly's real estate office, No. 902 8th St., N. W.; I have been there nearly thirteen (13) years. I remember the sale of the property in this case in Dec., 1873; I settled the account of sales at the request of Mr. J. C. G. Kennedy, the trustee; I have a copy of the account of sale, which I now produce—one of the originals which were made in duplicate, marked "A. F. F." I made all the disbursements except Mr. Kennedy's commission, the sewer tax, and Sixth street improvement tax, which were not paid at that time, the Sixth street improvement tax not having been assessed. The trustee retained his own commission, and Mrs. Mellen retained the $5,000 and the interest from the 15th of October. Mrs. Burche paid the back interest. The account shows the joint en-
336 cumbrance on the property at the time of sale, and as agreed to be paid by the trustee. The money for these disbursements were paid to Mr. Kelly by Mr. Kennedy, and I disbursed it by Mr. Kelly's checks. I prepared all the conveyances relating to the sale; there was only three, they were, 1st, a deed from the trustee to Mrs. Catharine Burche; 2nd, a deed of trust from Mrs. Catharine Burche to Rebecca R. Mellen, trustee; 3d, a deed of trust from Catharine Burche to two trustees; I am one I believe. My impression Richard Wallach, was the other; it may be Anthony Hyde. I believe I had it recorded after the sale. It required five hundred and ninety-one dollars $\frac{53}{100}$ to put the property in a tenantable condition; I paid the bills for Mr. Kelly, who was the agent of Mrs. Burche in making the repairs. I collected the rents for Mr. Kelly from Dec. 24, 1873, except the main house, which was not ready for occupancy; it remained idle until about the 18th day of March, 1874; the repairs were made as soon as possible, being in the midst of winter. There was a tenant
337 ready to occupy the house as soon as it was ready; the main house was rented at the rate of $100 per month, the offices rented for $500 per annum; the same tenants were in at the time of sale, and are there yet; there are two small shops on the premises, D street front, one occupied by Silas H. Moore at ten dollars per month, the other by John Bell at seven dollars per month; they were there at time of sale and paid rent from Dec. 24, 1873.

Cross-examined by Mr. MILLER:

I was not at the sale in December, 1873. At or about the time of that sale, Mrs. Burche employed Mr. Kelly as her agent. It was after the sale, as she employed him to collect her rents, and she had no rents to collect before.

Q. Didn't Mr. Kelly know before the sale that Mrs. Burche intended to buy that property?

A. I don't know anything about it.

Q. Hadn't you heard so?

338 A. No, sir.

Q. Who paid for these improvements, repairs, that you made?

A. I paid for them for Mr. Kelly who was agent for Mrs. Burche. During the spring of 1874 Mr. Kelly to a great extent advanced the money to pay them and afterwards deducted the money out of the rents. I paid the D street improvement tax on Dec. 29, 1873, amounting at that date to $668.66. I paid the general tax, '72 & '73, amounting to $366.63, on January 16, 1874. I paid the general tax for '73 & '74, on January 26th, 1874, amounting [to] $320.20. I paid the sewer tax Dec 30, 1873, $130.58 @ 70 cts. in sewer bonds, making $91.40; this last item was collected back through our office from the District. The 6th St. improvement tax I did not pay, and don't know that it has been paid. I do know that it was not paid or assessed at the time I made out this account, Exhibit A. F. F.

Q. You have testified in your examination-in-chief that
339 Mrs. Burche paid to Mrs. Mellen the arrearages of interest to October 15th, 1873. Do you know how they were paid?

A. Mrs. Mellen deducted the amount of the arrear interest out of the money she advanced on the property.

Q. When did you state this account?

A. On its date.

Q. To whom did you show it afterwards?

A. I made it out for Mr. Kennedy, and at his request, and I gave him the duplicate copy.

Q. What dates did you put into the three deeds relating to the sale?

A. They were not all alike. The deed from Mr. Kennedy to Mrs. Burche was dated first. The deed of trust to Mrs. Mellen was next, and bore date 24th day of Dec., 1873, and the deed of trust securing Kennedy, trustee, bore date of the same day; they were recorded in the same order; the trust to secure Kennedy last. My impression is that Mrs. Mellen had the two first named re-
340 corded and I had the other recorded; my impression is that Mr. Kennedy passed the two first deeds into the custody of Mrs. Mellen; either he or I did.

Q. Did you not wait until after you knew that both of those deeds had been recorded before recording the deed to secure Kennedy?

A. I deed, because it was so understood.

Q. By whom?

A. By all parties concerned. I mean, Mr. Kennedy, Mrs. Mellen, and Mrs. Burche; I didn't know Mrs. Wallach at all.

Q. When was it first so understood?

A. Between the time Mrs. Burche purchased the property, and the delivery of the papers. I don't know from whom that proposition emanated. I only carried out the direction of the parties.

Q. Did you not hear it discussed between them?

A. I did.

341 Q. At the time of your hearing that discussion, was the arrangement concluded that the matter should be closed in this manner?

A. It was always understood by me, that if either Mrs. Wallach or Mrs. Burche purchased this property as Mrs. Burche did, the matter should be settled as it was.

Q. Who led you so to understand?

A. Mr. & Mrs. Mellen, Mr. & Mrs. Burche, and Mr. Kennedy, trustee.

Q. Since the sale, and before any proceedings were had in these causes, or at any time, did you or not make application to borrow money on this property.

A. Never before the bill was filed. I think about a year ago, or within a year, Mrs. Burche proposed to borrow money enough to pay off Mrs. Wallach and Mrs. Mellen, and consolidate all claims against the property into one incumbrance. I may have spoken on the subject in behalf of Mrs. Burche to carry out the plan.

342 I don't know now when I did so; it was in the summer season, either last summer or the summer before.

Q. Will you please state why Mrs. Mellen was appointed trustee in that deed of trust?

A. She said she had so much trouble with the trustees, that as this was her mother's money, or at least the greater part of it, as she told me, she wanted her name placed in the deed as trustee, and that if the droperty had to be sold she would have no commission to pay if she or her mother bought it in; and she left me with the impression that she had very little, if any, of her own money in the transaction. I don't know that she said so in so many words.

Q. Do you collect all the rents for Mr. Kelly?

A. I generally take the money that is paid in at the office, and whatever Mr. Kelly collects he turns over to me. I am his cashier. Rents have varied here very little in the last three years.

343 Q. Would this property in this case have brought as much rent as it has done for the last 2½ years at any time within the last three or four years without the repairs that were put on it?

A. I don't think it would. I don't know the condition of the property before the sale. It wanted repairs when Mr. Kelly took charge of it for Mrs. Burche.

Q. Had it not apparently long wanted them?

A. It wanted painting pretty badly. It had the appearance that no repairs had been made for several years.

A. F. FOX.

Sworn to and subscribed before me, this 21st day of April, A. D. 1876.

E. C. INGERSOLL, *Exam'r.*

Adjourned to Monday, April 24, at 11 a. m.

INGERSOLL, *Exam'r.*

344 MONDAY, *April 24th*, 1876.

Met pursuant to adjournment.

Present: Mr. Bradley, for complainant, and Mr. Miller, for defendant.

Whereupon it is adjourned by consent of counsel to Monday, May 1st, 1876, at 11 o'clock a. m.

EDWARD C. INGERSOLL,
Examiner in Chancery.

MONDAY, *May 1st*, 1876.

Adjourned to Wednesday, 3d May.

MAY 3D.

Adjourned to May 4th, at 11 a. m.

INGERSOLL.

345 THURSDAY, *May 4th*, 1876.

Met pursuant to adjournment.

Deposition of Mrs. Burche.

Mrs. CATHARINE BURCHE, complainant in this cause, first duly sworn, deposes as follows:

Q. State, if you please, whether there was any agreement between Mrs. Wallach, your sister, and yourself touching Mrs. Wallach's taking your mother to reside with her.

A. There was; it was not in writing.

Q. State, if you please, the circumstances under which that agreement was made, and the terms and substance of the agreement itself.

A. It was made soon after my mother's seizure with paralysis, and in my absence it was made between Mrs. Wallach and Mrs. Wiltberger, who has testified in this case; the first time I came into the city after the agreement had been made, Mrs. Wiltberger informed me what it was, in the presence of Mrs. Wallach,
346 and asked me if I was willing to accede to the terms. I replied that I was. My mother was then living with Mr. Fendall Cain, her nephew. The terms of the agreement were substantially these: Mrs. Wallach was to take Mrs. Hewitt and provide for her comfort, to receive the rents of the estate, that is, the property in question, to pay the taxes on the property, and to assume mother's position in regard to the property entirely, and as it had always been ample for the support of our mother when her expenses were greater than they were at that time, Mrs. Wiltberger thought it would be an assistance to Mrs. Wallach to have her. It was understood that I was to have nothing to do with the management, neither sharing in any deficit, should there be any in the income to meet the expenses of the property, nor benefiting from any surplus.

Q. How long did your mother remain at Mr. Cain's after this agreement?

A. I am not certain; not more than a month, if that. She
347 was taken to Mrs. Wallach's house from Mr. Cain's. Mrs. Wallach was not living in the property in question at this time. The agreement that I have testified to was made in the latter part of January, A. D. 1870, and Mrs. Wallach moved into the property in question in the spring of '71, soon after the death of

Mrs. Wallach's daughter Annie, which occurred in the latter part of March, 1871.

Q. Had you any conversation with Mrs. Wallach in reference to Mr. Wallach's moving into that property? And, if so, please state what was said.

A. I had conversation with her after the death of her daughter, and before she moved in, on that subject. She asked me if I had any objection to offer as to her occupying the house herself? I replied that I did not. I considered I had no right to make an objection, though the move was contrary to my judgment, as by the terms of the agreement she was to manage the property as she thought best, and I was to have nothing to do with it.

348 Q. Do you mean to say that you stated that objection to her at that time?

A. I might have done it at that time, but am not sure. I know I did not object to her moving into the property. Mrs. Wallach was then in trouble, and we didn't discuss the matter more than was actually necessary.

Q. Now state, if you please, whether you did or not, at any other time, and if, at any other time, when and under what circumstances, make to her the same statement to which you have testified to in substance?

A. I remember an occasion previous to this time, on which Mr. Burche and myself were at her house and she offered to show us her accounts; we both declined to look at them, saying that we had nothing to do with either her receipts or disbursements.

Q. Do you recollect whether you offered to Mrs. Wallach to take Mrs. Hewitt to your house to live?

349 Question objected to, as irrelevant.

A. I did.

Q. Please to state whether it was before or after Mr. Wallach moved into the property and all that passed between you as well as you can recollect.

Question objected to, as irrelevant.

A. It was before she moved in and during her daughter's sickness. I thought to relieve her of the care of my mother I would propose, and did, to take her to my home. Mrs. Wallach objected, saying that she could not live without the income of the property.

Q. State, if you please, the facts and circumstances in relation to the borrowing of the $5,000.00 from Mrs. Mellen, at whose instance it was done, and who was the active party in procuring the loan?

A. In a conversation with Mrs. Wallach, which occurred in the fall of the year after she had taken the property, she was in great
350 distress on account of not being able to finish furnishing the house in order to take boarders. She requested me on that occasion to make an application to borrow money for that purpose from Gen'l Albert Pike, and went with me a part of the way to show me where his office was. It was then on F St. I went as directed, but found him not at home, and failed to see him. A short

time after that, in another conversation on the same subject, she requested me to make the same application to Mr. Stansberry. She said that she was in such strait that she thought they, being Masons, might relieve her, as her father had held a prominent position in that fraternity. I saw Mr. Stansberry, and preferred her request. He professed himself unable to accommodate her. I then went to Mr. Charles Bradley, of the Bank of the Republic, and made the same request of him. He told me he thought she could get the money from the Freedman's Bank by giving a lien on the property.

It then occurred to me that her extremity might be my op-
351 portunity, as I had been trying to raise a loan upon my undivided interest in the same property, but had failed to do so, the security not being deemed sufficient. I then proposed to Mrs. Wallach to give a joint note secured upon the whole property and thus get the amount we each needed. She assented to it, and Mr. Charles Wallach, her husband, with much more alacrity than she. The money was obtained from Mr. Koones, Mr. Richard L. Wallach seeing him and enlisting his services to borrow the money from Mrs. Rebecca R. Mellen. Mr. Burche did not assist me in procuring the loan he was opposed to my getting it, and only consented to sign the deed after the loan was effected.

Q. Did you pay any portion of the interest on that loan?

A. I did. I paid until the quarter ending April 15th, 1873, after my mother's death, which was in December, 1872.

Q. Did you have any conversation with Mrs. Wallach about your stopping payment of interest?

352 A. I did on several occasions; a few days after my mother's death Mrs. Wallach wrote me a note in the presence of Mrs. Wiltberger, and mailed it me. I destroyed the note in which she proposed that we allow our affairs to be managed by strangers; I replied to it that I saw no reason why there should be any difficulty in the adjustment of our affairs, but if she preferred that mode of settlement I offered no objection; nothing else occurred until the following June, when I went to see her, and told her that I had no means to pay the interest of our joint note, except from the income of my part of the property, and that I should certainly depend upon that for its payment; she then told me if I would guarantee her possession of the house for a year from that date and agree to some improvements which she thought necessary, she would pay me $50.00 a month in cash, though she had been charging herself with that amount of rent to me from the time Mrs. Hewitt died; previous to this I had received a note from Messrs.

Pike & Johnson, signing themselves as attorneys for Mrs.
353 Wallach; I now produce this note and my reply.

(The same are here filed and marked Exhibits C. B. Nos. 1 and 2, respectively.)

Adjourned to Saturday, 6th inst., 11 a. m.

INGERSOLL.

Double Session.—E. C. I.

SATURDAY, *6th May*, 1876.

Met pursuant to adjournment.

Witness resuming says:

This Exhibit C. B. No. 2 I brought myself to Mr. Jos. H. Bradley (now present), and left it with him, and have never seen it since until Mr. Bradley handed it to me a few days ago, asking me to bring the letter to which the exhibit was the reply.

Q. Do you recollect any conversations with her in regard to selling the property; if so, state all you recollect about it.

A. I do recollect one or two conversations I had with her about it. She seemed to think that [from] my anxiety to sell that I would be willing to see the property sacrificed, and in order to re-
354 lieve her of that fear I proposed to her to set a limit, and asked her what she thought it was worth. She said she would be willing to take $30,000.00, and it was on that limit of hers that I suggested to Mr. Bradley to reply to her note asking him what I would take for my half, $15,000. I took her own limit, not mine. I proposed to her to advertise the property. She replied she had no money to do so, but as she was going to New York on a pleasure excursion, that any arrangement Mr. Pike and her son Richard would make in her absence would be satisfactory to her. A few days after I saw Richard L. Wallach, and proposed to him, by way of saving expense, to place a placard on the fence on the corner lot. He offered no objection, and I had it done accordingly. The property was advertised in this way, and directions for parties wishing to purchase to inquire within. Mrs. Wallach was occupying the main house, and Messrs. Pike & Johnson the wing, at that time.

Q. Do you recollect the fact of the matters being submitted to arbitration?

355 A. I do, perfectly. The arbitrators were Gen'l Albert G. Pike on the [part] of Mrs. Wallach, and Mr. Bradley, now present, on my part. An award was made, and a copy of it delivered to me. I accepted the award on my part, and never refused to abide by it, but expressed myself satisfied with it.

Q. State, if you please, what led to this arbitration.

A. As soon as Mrs. Wallach returned from New York, I went to see her—this was in the summer of 1873—relative to my mother's personal property, which was in Mrs. Wallach's possession, and of which I have never had any benefit. She met me in a very excited manner as to the placard upon the fence, saying that as I had advertised my property she would like for me to tell her what answer to make should any one wish to purchase. I commenced to reply, but she ordered me to hush in the most peremptory manner, and, for any further information I might wish on the subject, referred me to Gen'l Pike. I then consulted Mr. Bradley, who advised
356 me to sue for a division of the property. I proposed instead arbitration, and the arbitration was had, she remarking that

she had advised that in the beginning. After this all personal intercourse between us ceased. Mrs. Wallach has never paid me anything for the rent of the property for the time she occupied the premises after Mrs. Hewitt's decease.

Q. Had you anything to do personally with the sale and purchase of the property under the deed of trust to Kennedy?

A. Nothing whatever; Mr. Burche acted for me in that matter.

Q. What were the terms of the arrangement between you and Mrs. Mellen in the event of your becoming the purchaser?

A. I never saw either Mr. or Mrs. Mellen until after the property was advertise for sale; then Mr. Burche and myself went to see them; Mrs. Mellen informed us that Mr. Mellen was authorized to act for her in the business; he then made a proposition to us
357 which he said he had previously made to Mrs. Wallach, and which she had asked him to allow her until the following Tuesday to consider of, and that she had requested him in the meantime not to mention it to us. The proposition was to allow the lien to remain on the property in lieu of a cash payment at the sale. He further offered to lend whatever money would be required to pay taxes and liabilties against the property. He also said that Mrs. Wallach requested him to bid for her at the sale.

Q. Was there any concealment in regard to that proposition as between you and Mrs. Mellen, or any understanding that this proposition to you should not be made to Mrs. Wallach?

A. None whatever.

Cross-examined by Mr. PIKE:

Q. Was there any understanding or agreement between yourself and Mrs. Wallach in regard to your becoming the purchaser at the sale under the trust deed?

358 A. There was not.

Q. Do you know that Mrs. Wallach had any knowledge as to your intent to bid at the sale?

A. I do not.

Q. Did you communicate to Mrs. Wallach the information that you intended to bid at that sale?

A. I did not.

Q. What was the agreement between yourself and Mrs. Wallach as to the payment of the interest on $5,000 borrowed from Mrs. Mullen? Was it not that inasmuch as you received one-half of the money borrowed that you should pay one-half of the interest and she the other half as the same matured?

A. It was.

Q. Your mother being alive at the time said money was borrowed, from what source did you expect to get the money to
359 pay your portion of the interest?

A. I had provided for the payment of the interest by devoting a sum of money which was to be paid to me in the way of board from a friend, Miss Mary Jane Taylor.

Q. Was there any other source from which you expected to receive the money?

A. None.

Q. Between the date of your mother's death and the submission to arbitration mentioned in your direct examination, did you and your sister, Mrs. Wallach, come to any clear and distinct agreement as to what should be done with the property in dispute; if yea, state specifically what that agreement was.

A. We did not come to any agreement.

Q. Please state what, if any, steps were taken by you to secure the money to pay the interest on the $5,000 loan from after your mother's death.

360 A. I paid the interest to the first quarter after my mother's death, coming due in January. I should have continued to do so had not her death, which occurred in December previous, placed my property in my possession, which rendered all other effort unnecessary.

Q. It was not, then, a matter of impossibility for you to have raised the money to have paid the interest from other sources, but simply a matter of desire and preference to have the benefit of what you deemed to be your right in the property, and to realize the money from that particular source?

A. It was a matter of impossibility, and to show that it was not a desire to have that particular property, I even tried to borrow the money to pay the interest on borrowed money while Mrs. Wallach was enjoying all the proceeds.

Q. From whom did you make your efforts to borrow some money, as you have stated in your last answer?

361 A. From Mr. Darneille, a broker.

Q. What were the times in which you made such efforts, and did you state to him specifically for what purpose you desired to have the money?

A. I don't recollect now the dates, but I was very desirous of preventing the property from being sold, and Mr. Burche's own obligations and the expenses of his family were more than he could meet. I did not state specifically to Mr. Darneille for what purpose I wanted the money; I mean by Mr. Burche my husband.

Q. State specifically what steps you took to carry the award of the arbitrators into execution.

A. I consulted Mr. Joseph Bradley, offering to abandon the claim allowed me by the arbitration if she would consent to settle; we only heard through Mr. Oliver, her attorney at that time, and Richard L. Wallach that she was very much dissatisfied with the award; I took no other step than consult Mr. Bradley.

362 Q. Was any such proposition submitted in writing to Mrs. Wallach?

A. Mr. Bradley addressed her a note on the subject.

Q. If you can, produce a copy of that communication.

A. I have no copy; it was written by Mr. Bradley.

Q. Please state what payments have been made by you, giving the time and manner thereof, on account of your purchase at the sale under the trust.

A. Mr. Burch acted as my agent and settled according to the

previous agreement with Mrs. Mellen. I understand thoroughly how it was done, and approved all that was done on my behalf; the settlement was made according to Mr. Fox's statement, heretofore testified to in this case.

Q. You have said on cross-examination that you did not communicate your intention to purchase at Kennedy's sale to
363 Mrs. Wallach. State the reason why you did not communicate it to Mrs. Wallach.

A. I held no communication whatever with Mrs. Wallach from the time she ordered me to hush, in talking about the business, and referred me to Gen'l Pike.

Q. Did you or not at that time understand from Mr. Mellen that the same proposition he had made to you as to terms of sale, if you or she should become the purchaser, had been by him submitted to her?

A. I did distinctly so understand from both Mr. and Mrs. Mellen.

Q. Do you remember by whom the last instalment of interest due by you on the $5,000 loan was paid, and state the circumstances?

A. It was paid by Mr. Burche out of his own funds. The friend to whom I alluded to previously, and upon whose board I had depended, died, or I should not have been obliged to borrow the money from my husband.

364 Re-cross examination:

Q. Did you advise Gen'l Pike, or any member of the firm of Pike & Johnson, or Mr. Richard L. Wallach, or Mr. John N. Oliver, or any one else whom you recognized or understood to be Mrs. Wallach's agent or attorney, that you intended to bid at the trust sale?

A. I did not.

Q. Was Mrs. Wallach, or any one whom you recognized or understood to be her agent or attorney, present at your conversations with Mr. & Mrs. Mellen.

A. No they were not.

Examined by Mr. BRADLEY.

Q. Was Mrs. Wallach, or any person whom you recognized as her agent or attorney, present at the sale, and did such person bid on the property?

A. I was not present at the sale.

CATHARINE BURCHE.

365 Sworn to and subscribed this 6th day of May, A. D. 1876.
EDWARD C. INGERSOLL, *Examiner.*

Adjourned to Wednesday May 10th, 11 a. m.

INGERSOLL.

WEDNESDAY, *May 10th.*

Met pursuant to adjournment, and adjourned to Saturday, 13th inst., at 11 o'clock a. m.

INGERSOLL.

SATURDAY, *May* 13*th*, 1876.

Adjourned to day to be agreed upon.

INGERSOLL, *Examiner*.

366 *Double Session.—E. C. I.*

MONDAY, *May* 15*th*, 1876.

Met by agreement of counsel.

Present: Mr. Bradley, for compl't, and Mr. Pike, for def'ts.

Mrs. WILTBERGER, recalled for compl't, deposes as follows:

Q. Please to state whether you ever had any conversation with Mrs. Wallach in regard to the cost of supporting and providing for her mother after she took charge of her under the agreement to which you have testified.

A. Yes, sir.

Q. Now state, if you please, as well as you can recollect, the substance of any such conversation or conversations tending to show whether it was a benefit to her or a burden to her.

A. Sometimes she would make some complaints, but if I referred to making any charge, she would reply that she couldn't do without the income.

367 Q. State, if you please, whether you recollect any conversations with her after the death of her mother touching the interest of Mrs. Burche in the income from the property.

A. Yes, sir; she and I frequently spoke upon the subject, and she always said she thought with me that Kate (Mrs. Burche) was entitled to one-half the income or rent from the property, and that she had charged herself with $50 per month as rent to Kate, and would pay it; on several occasions she made this statement to me.

Q. Did she say whether she had paid any of it or not?

A. She said she had not, but intended to do so; on one occasion she mentioned her not being able to pay; I suggested to her if she was only able to pay $20.00 per month, which was just Kate's interest payment per month, that it would save the property from being sacrificed and sold; to that she objected, saying she could not or would not pay Mrs. Burche's debts.

368 Cross-examined by Mr. PIKE:

Q. Was it before or after the submission to arbitration made between Mrs. Burche and Mrs. Wallach?

A. I cannot be positive about it, but think most certainly it was before, because I think I had but one conversation after the arbitration with Mrs. Wallach on the subject.

Q. At the time you made this suggestion was there not great hostility existing between Mrs. Burche and Mrs. Wallach?

A. Not hostility, perhaps, but certainly a great misunderstaning as to the terms of settlement.

Q. Please state what knowledge you had, derived from conversations had either with Mrs. Burche or Mrs. Wallach, as to this misunderstanding.

A. I thought Lavinia took wrong views of what was due to her under that engagement she entered into with me touching
369 her mother's care and support. That is my impression of what the difficulty arose from.

Q. State, if you please, what was the cause of Mrs. Burche's complaint, so far as you had knowledge of the same from conversations with her.

A. I never heard any complaints from her, except that she said she certainly thought Lavinia ought to give her the $20 a month to pay the interest at least.

Q. Please state if Mrs. Wallach, in her converstations with you, gave any reasons why she was unable to pay Mrs. Burche money; and, if so, state what reason she gave.

A. She gave me no reason otherwise than she could not do it in the present state of things.

MRS. VERLINDA WILTBERGER.

370 *Deposition of Kate O'Leary.*

KATE O'LEARY, of lawful age, first duly sworn, deposes and says as follows:

Q. Did you live with Mrs. Lavinia Wallach, on 6th, at any time after her mother, Mrs. Hewitt, was living with her?

A. I did.

Q. How soon after (if you know) Mrs. Wallach moved on 6th St. did you go there to live?

A. The July after the death of her daughter, Annie.

Q. How long did you live there?

A. Going on two years, off and on; I left the fall before Mrs. Hewitt died.

Q. Who attended to and waited on Mrs. Hewitt during the time you were there?

A. I did the principal part.

Q. Was there any body else, except you, employed to wait upon and attend Mrs. Hewitt while you were there?

371 A. No, sir; there was not.

Q. What was your other employment in the house?

A. I done Mrs. Wallach's sewing and her up-stairs work.

Q. Was there any other help employed in the house; and, if so, what were they employed to do?

A. There was nobody up stairs but me; there was a cook down stairs.

Q. Was the cook employed all the time; and, if not, what portion of the time were they without a cook?

A. They were very often without a cook.

Q. Who did the cooking when there was no cook?

A. I did, when there was no one there to do it.

Q. What wages per month did you receive.

372 A. Ten (10) dollars.

Q. Did any one sleep in Mrs. Hewitt's room while you were there; and, if anyone, who?

A. I slept in the room, and Mrs. Wallach a part of the time.

Q. Do you know whether Mrs. Wallach rented out any of the rooms in that house; and if so, can you state what rooms, and to whom they were rented from time to time?

A. She did rent the rooms; when I first went there she had no rooms rented. Her first tenants were Dr. Roland and Judge Goldthwaite; they occupied the whole of the second floor (4 rooms). Then there was Messrs. Pike & Johnson in the offices down stairs, one room at first and afterwards two rooms. Then there was Mr. Harvey, Dalton, and Robert Wallach. Mr. Dalton had the 3d floor front room, Mr. Harvey the 3rd floor back, and Mr. Robert Wallach had the back room, 2d floor, after Judge Goldthwaite left.

373 Cross-examined by Mr. PIKE:

Q. Please state whether the premises were occupied continuously by tenants during the time you were with Mrs. Wallach?

A. There were times when there were some of them idle.

her
KATE x O'LEARY.
mark

Sworn to and subscribed by mark before me, this 15th day of May, A. D. 1876.

E. C. INGERSOLL, *Examiner.*

374 *Deposition of Mrs. Pedrick.*

AMERICA G. PEDRICK, of lawful age, first duly sworn, deposes as follows:

I am sister-in-law to Mrs. Burche and cousin to Mrs. Wallach.

Q. Do you recollect when Mrs. Wallach was living on 6th St., and her mother with her?

A. Perfectly.

Q. According to the best of your recollection and belief, had you any conversation with her relative to the cost and trouble of taking care of her mother during that time?

A. Yes, sir; desultory ones at different times.

Q. State, if you please, according to the best of your recollection and belief, whether she spoke of it as a cost and expense to her, or as an advantage to her; and if so, state the substance of her conversation in that regard, as well as you can recollect.

375 A. Sometimes she remarked to me that her mother was an expense, and that the income was not sufficient without Mr. Wallach's aid; at other times she stated that she could not live without the income from the property. I think upon one or two occasions I suggested to her that Mrs. Burche should take her mother for a portion of the year, and her reply was that she could not do without the board she was charging for her mother.

Q. Do you recollect any conversations with her after the death of Mrs. Hewitt in reference to Mrs. Burche's interest in the property?

A. She always seemed to recognize Mrs. Burche's right to one-half, and said several times that she was charging herself with $50 a month as rent for the house.

Q. Did she say anything about having paid Mrs. Burche anything on account, or why she had not, if she had not?

376 A. She said she had never paid Mrs. Burche anything, because, as she said, she was not able, but expected it to be settled at the general division.

AMERICA G. PEDRICK.

Sworn to and subscribed, this 15th day of May, A. D. 1876.

E. C. INGERSOLL, *Examiner.*

377 *Deposition of R. W. Burche.*

RAYMOND W. BURCHE, of lawful age, first duly sworn, deposes as follows:

I am the husband of Mrs. Catharine Burche.

Q. Had you at any time any conversation with Mrs. Lavinia Wallach in reference to her taking charge of and supporting her mother, and if so, please to state the substance of these conversations as you now recollect them, and the order of time in which they occurred.

A. Yes, sir, repeatedly; after Mrs. Hewitt was placed in the charge of Mrs. Wallach, my wife stated the terms of the arrangement, and Mrs Wallach, upon several occasions, one notably, said to me that she couldn't possibly save out of the income, after the support of Mrs. Hewitt and payment of taxes, more than $30.00 per month; and upon two occasions offered to show me her bill of expenses, which I declined to look at, because it was no difference to me, as I told her, whether she made the whole hundred dollars a month or one cent.

378 Q. Did you ever have any conversation with her as to the terms upon which she took Mrs. Hewitt?

A. Yes, sir; often.

A. State the terms.

A. That Mrs. Wallach being in need of means, and her husband's property having been lost, she asked me if I would agree to the arragement with my wife, that she, Mrs. Wallach, should take her mother, support her, rent and receive the income from her mother's property, without any charge to Kate, my wife, and I replied, yes; I having nothing on earth to do with it; what you and your sister do is perfectly agreeable to me.

Q. In that conversation was any thing said about expenses of the property, taxes, insurance, and repairs; and if yea, what was said?

A. There was nothing said about the expenses of the property, for none of us knew what they were; I suppose I didn't,

379 but she distinctly said that her ma's personal expenses and taxes were never as much as the rent, and the surplus would be some little benefit to her husband, Charles Wallach, and expressly stated that she desired the arrangement.

Q. Do you know whether or not your wife at any time offered to

Mrs. Wallach to take her mother home to your house; and if so, state all you know on that subject.

A. I was never present upon any such occasion.

Q. Were you present at the sale of the property?

A. Yes, sir.

Q. Do you know whether there was any one there claiming to act as the agent of Mrs. Wallach, and who had previously so claimed to act? and if so, state all you know about it.

A. Richard L. Wallack and Mr. Walter Lennox were there,
380 but I don't know about their claiming to be agents. They both had had, however, repeated communications with myself and wife touching the property on behalf of Mrs. Wallach. They were both lawyers. Mrs. Wallach's son, Richard, never had any talk with me; Walter Lennox frequently. At the time of the arbitration Mr. Lennox sent for me. I called to see him and he stated if it was not for me the two sisters could get along. I asked him why. He said that I objected to Mrs. Burche's assuming one-half of the special taxes, and I replied that I did not; that Mrs. Burche would agree to that—that is, the half of the special taxes; that Mrs. Wallach understood she was to pay the general taxes, and that it could be settled in five minutes, and to go to Joseph H. Bradley, Jr., Mrs. Burche's attorney. This was before the sale. At the sale the auctioneer put the property up as a whole after one bid. Mr. Lenox objected to its being sold in that way; that the improvements would not add to the value, and demanded that it be
381 sold by the square foot. The auctioneer, Mr. Kennedy, Mr. Walter Lenox, and Richard L. Wallach had a consultation, and it was put up by the square foot. After the sale Mr. Lenox asked me if I was satisfied. I told him I was. He replied that if we could settle about expenses it was a mighty good sale.

Cross-examination:

Q. Did Mr. Lenox or Mr. Richard Wallach, at the sale to which you have referred, show any authority or make announcement that they were authorized to represent Mrs. Wallach, either as agent or attorney?

A. They did not to my knowledge.

Q. When the change was made, as you have mentioned, did the auctioneer announce what were the exact number of square feet in the property he was proposing to sell?

A. He did, sir, distinctly; and at every bid those who were
382 bidding calculated the amount the property would come to, and then appealed from their calculation to the auctioneer as to the exact amount the property would come to at the bid.

Q. What were the exact number of square feet announced by the auctioneer?

A. I do not know.

Q. Was it announced at the sale by Mr. Claget that he bid the property in for Mrs. Burche?

A. Not in my hearing; Mrs. Burche had asked him to bid for her, because I declined.

Q. What were the terms upon which Mrs. Burche was permitted to be purchaser?

A. The terms of the sale. I do not know of my own knowledge what Mrs. Burche's agreement with Mrs. Mellen was; I knew after the sale the trustee and auctioneer called upon Mrs. Burche
383 to settle for the sale, and then I knew the terms and was present at the settlement.

Q. Why did you decline to bid for Mrs. Burche at the sale?

A. Because I was embarrassed at the time, and had always allowed her to manage her own matters to suit herself.

Q. Please state specifically what were the terms upon which Mrs. Burche's settlement of the purchase was made so far as you have any personal knowledge of them, or as derived from — or the trustee.

A. The auctioneer or trustee never said anything to me about it. From Mrs. Burche, and afterwards from Mrs. Mellen. The terms were to be that in the event of either party purchasing this property, Mrs. Mellen would continue the loan, and advance whatever funds were necessary to pay taxes and expenses of sale, upon the purchaser whichever it was of these two sisters, giving a first lien for
384 the money, and that she had at Mrs. Wallach's request given her one week to consider before she informed Mrs. Burche of that arrangement. Mrs. Burche and myself called upon Mrs. Mellen, and she confirmed that statement, and at the same time Mr. Mellen informed me that Mrs. Wallach asked him to bid in the property for her. Mrs. Wallach was not present at either of these conversations.

RAYMOND W. BURCHE.

385 *Appeal to General Term. Filed July* 11, '77.

In the Supreme Court of the District of Columbia.

SUSAN L. WALLACH
vs.
CATHARINE BURCHE. } No. 4423. Eq. Doc. 15.

The complainant prays an appeal from the decree passed in this cause.

THOS. JESUP MILLER &
L. S. PIKE, *Sol'rs*,

Calendered as ordered by the clerk, July 11, '77.

386 *Decree in General Term. Filed Jun. 5, '78.*

In the Supreme Court of the District of Columbia, in General Term, the 5th day of June, A. D. 1878.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH, JOSEPH C. G. KENNEDY *et al.* } No. 3571. Eq. Doc. 13.

SUSAN L. WALLACH
vs.
CATHARINE BURCHE, REBECCA R. MELLEN *et al.* } No. 4423. Eq. Doc. 15.

These causes coming on to be heard together by the consent of counsel, and the court having heard and considered the argument of counsel, upon consideration by the court, it is ordered, adjudged, and decreed that the said causes relate to the same subject-matter ought not to be separated, and they are hereby consolidated as one cause.

Second. That the decree in the said cause No. 3571 be, and the same is hereby, modified as is hereinafter more fully stated.

387 Third. That the decree in the said cause No. 4423 be, and the same, is hereby reversed.

Fourth. That said causes be remanded to the special term, with instructions to consolidate the two causes, and to enter in said consolidated causes a decree and order, as follows: The said sale made by said Joseph C. G. Kennedy, as trustee, set out and contained in the proceedings in these causes, be, and the same is hereby, confirmed and made valid. But inasmuch as the settlement therefor made by the said trustee, Mrs. R. R. Mellen, the creditor, and Mrs. Catharine Burche, the purchaser at said sale, is complained of, and it is alleged that the account on which said sale was settled was made up without the knowledge of said Susan L. Wallach, and by said Susan L. Wallach it is alleged that a much larger amount has been charged to her than is justly chargeable on such settlement, and in order to settle the equities of the parties interested in said sale, to wit, between the said Rebecca R. Mellen and the said Susan L. Wallach and Catharine Burche, and between the said Rebecca

388 R. Mellen and the said Catharine Burche, and between the said Susan L. Wallach and the said Catharine Burche, growing out of said sale and otherwise, the said two causes consolidated into one be referred to James G. Payne, Esq., as special auditor of this court, to state and return to this court separate accounts, as follows:

1st. An account to show what, if any, liens or incumbrances of any kind or character whatever existed on the day of the death of Mrs. Susan L. Hewitt, to wit, on the 15th day of December, 1872, on the property mentioned and described in the pleadings in these causes; and, if any, the particular kind or character of each, the amount thereof, when created or arising, and on what particular account.

2d. An account to show what portions, if any thereof, were justly chargeable to the separate account of Susan L. Wallach, and what portion, if any, to the separate account of Catharine Burche.

3d. An account to show what, if any, liens, incumbrances of any kind or character whatever, arising or created between the
389 day of Mrs. Susan L. Hewitt's death, the 15th day of December. A. D. 1872, and the day of the sale of said property made by Joseph C. G. Kennedy, as trustee, under the deed of trust made to him as such trustee by Catharine Burche and Raymond W. Burche, her husband, and Susan L. Wallach and Charles S. Wallach, her husband, to secure payment of a debt of $5,000 to Rebecca R. Mellen, and mentioned and described in the pleadings in these causes, to wit, the 8th day of December, A. D. 1873, existed on said 8th day of December, A. D. 1873, on said property, and, if any, the particular kind or character of each, the amount thereof, when created, and on what account.

4. An account to show what portions, if any thereof, were justly chargeable to the separate account of Susan L. Wallach, and what portion, if any, to the separate account of Catharine Burche.

5th. An account to shew whether any, and, if any, what sum of money is justly chargeable to said Susan L. Wallach in favor of said Catharine Burche for and on account of the use
390 and occupation of said property by said Susan L. Wallach, from the 15th day of December, A. D. 1872, up to and until the 15th day of January, A. D. 1874.

6th. An account to show whether said Susan L. Wallach is or is not justly indebted to said Catharine Burche for or on any other account, and, if so, in what amount, would furnish a just ground for rebate or set-off against the interest of the said Susan L. Wallach, in the proceeds of the said sale of said property, under the deed of trust to said Joseph C. G. Kennedy from said Catharine and Raymond Burche and Susan L. and Charles S. Wallach, mentioned and described in the pleadings in these causes.

7th. An account to show what were the actual expenses incurred by the said trustee Kennedy in and about the making of the sale of said property, made by him on the 8th day of December, A. D. 1873; what amount of money, if any, has been actually paid for, and on what account of, such expenses and the execution of said
391 trust, by whom and on what particular account each and every such payment was made.

8th. An account to show what liens and incumbrances, if any, of any and every kind or character whatsoever on said property, have been paid off and satisfied by said Catharine Burche since the 8th day of December, A. D. 1873, and prior to the day of stating this account, and what amount of money, if any, has been actually paid on account of such lien or incumbrance; and that all the equities between the said parties touching the matters in controversy in these causes be, and the same are hereby, reserved until the final confirmation of the report which may hereafter be made by the said auditor in the premises.

By order of the court. D. K. CARTTER,
Ch'f Justice.

*387 *Motion to Enlarge Order of Reference. Filed Apr. 26th, '77.*

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE, *vs.* S. LAVINIA WALLACH. } No. 3571. Eq. Doc. 13.

and Consolidated.

S. LAVINIA WALLACH, *vs.* CATHARINE BURCHE. } No. 4423. Eq. Doc. 15.

And now, April 15th 1879, comes defendant, Rebecca R. Mellen, by Mr. L. G. Hine, her solicitor, and moves the court to enlarge the order of reference heretofore made in above causes to J. G. Payne, special auditor, so as to permit an account between said defendant and defendant Catharine Burche.

L. G. HINE,
Sol'r for Rebecca R. Mellen.

And the said Catharine Burche moves the court to enlarge the said reference to the auditor, J. G. Payne, to state the account between said Catharine Burche and said S. Lavinia Wallach, as prayed for in original bill No. 3571.

JOS. H. BRADLEY
For Compl't, Wallach.

*388 *Order Denying Motion. Filed Apr. 26th, '79.*

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE, *vs.* S. LAVINIA WALLACH *et al.* } No. 3571. Eq. Doc. 13.

S. LAVINIA WALLACH. *vs.* CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

These causes coming on to be heard, on the motion of the solicitors for Catharine Burche and of the solicitor for Rebecca R. Mellen to enlarge the powers of the special auditor, and to direct him to state further accounts thereupon, upon consideration thereof, and after argument, it is ordered and decreed, this 26th day of April, A. D. 1879, that the said motions be, and the same hereby are, denied without prejudice, nevertheless that the court may so order upon the hearing of the causes.

By the court: MACARTHUR, *Justice.*

*389 *Report of Special Auditor. Filed May 5, '79.*

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

These two causes consolidated are referred to me as special auditor to state separate accounts, eight in number, specially designated in the order of reference.

These accounts will be found in Schedules A to H, inclusive, returned with this report, and are made up from the depositions and exhibits previously taken and filed in these causes, together with the depositions taken by me and returned herewith, and the exhibits filed with me, which are also returned herewith, and marked Exhibits J. G. P. Nos. 1 to 7, inclusive.

*390 Schedule A is a statment of the liens and incumbrances on the property existing at the death of Mrs. Susan L. Hewitt, the 15th day of December, 1872.

Schedule B shows what portions of the liens and incumbrances in Schedule A were justly chargeable to the separate account of Susan L. Wallach, and what portion to the separate account of Catharine Burche.

Schedule C shows an account of the liens and incumbrances arising or created between the death of Mrs. *Mrs.* Susan L. Hewitt, and the sale of the property under the deed of trust to Jos. C. G. Kennedy, December 8th, 1873.

In this schedule the item of assessment for sewerage purposes is not carried out, for the reason that it was not clearly a lien upon the property. It was paid after the sale by A. F. Fox on behalf of the trustee, in certificates, at a cost of $91.40. The assessment was subsequently cancelled by act of Congress, and the amount paid was refunded.

*391 In connection with the statemant of this account, there has been serious discussion over the special improvement of 6th street in front of this property, and the assessment therefor.

The first question is as to the time of the completion of the said improvement. Upon this point it appears to be established that the improvement was substantially completed at the date of the trust sale, the 8th of December, 1873.

The next question is whether such completion created an immediate lien upon the property for the cost of the improvement, or whether such lien was postponed to the assessment, which in this case was not made until the 12th of May, 1875, and was not completed and entered upon the books until the 15th of July, 1875. (See Exhibit J. G. P. No. 7.)

In the discussion of this question no authority in the way of precedent was furnished upon either side, nor have I been able to find an adjudicated case exactly in point.

There is a case decided by the old circuit court of this Dis-
392 trict in 1829, in which the plaintiff purchased city lots of the defendant in August, 1827, and afterwards was obliged to pay the city taxes for the year 1827. Hunt *v.* Smith, 3 Cranch C. C., 432. These taxes were not assessed until November, and were not payable until the 1st of January following. In suit brought to recover the amount of those taxes from the vendor, the court held the he was not liable.

It seems to me that to hold the lien as attaching prior to the assessment would place a serious obstruction in the way of real estate traffic.

As in the present case, the extent of the lien was not ascertainable at the time of the sale; it could not then he paid out of the purchase-money, nor could the trustee retain any definite or given sum for such payment. No satisfactory arrangement could be made in such case for its payment.

On the other hand an intending purchaser could easily ascertain from the public records that the assessment had not been
393 made, and take that fact into consideration in making his offer for the property.

For the purposes of this account I have treated this improvement as not creating a lien upon the property until the assessment.

With reference to the general tax for the year ending June 30th, 1874, the legislative act of June 26th, 1873, imposing this tax, provided in express terms, that it should be collectable at any time after the first of July, 1873. I have, therefore, treated the whole of the tax as an existing lien at the date of the trust sale, and chargeable equally between the parties.

Schedule D shows the portions of indebtedness in Schedule C, chargeable respectively to Susan L. Wallach and Catharine Burche.

The interest on the $5,000 trust debt was to have been paid in equal moieties by Mrs. Wallach and Mrs. Burche, as it accrued quarterly and became payable. Mrs. Wallach paid her share up to and including the instalment due October 15th, 1873. Mrs. Burche
394 was in default as to her share from the 15th of October, 1872, which accounts for the difference in the amounts charged to each respectively in this schedule.

Schedule E shows the sum chargeable to said Susan L. Wallach in favor of said Catharine Burche on account of the use and occupation of the said property by said Susan L. Wallach, from the 15th of December, 1872, until the 15th day of January, 1874.

The best evidence furnished in the cause shows the reasonable monthly value of the use and occupation of the premises to have been one hundred dollars. Of this Mrs. Wallach was entitleh to one-half and Mrs. Burche to the other one-half, making the amount chargeable to Mrs. Wallach in favor of Mrs. Burche fifty dollars per month. Mrs. Burche purchased the property at the trust sale

and received a deed for the same December 24th, 1873, from and after which date, so far as appears, she would be entitled to all the rents and profits. As the order directs me to state this account from the 15th of January, 1874, I have calculated the $50
395 per month to the delivery of the deed, December 24th, 1873, and made a separate calculation for the rest of the period, based upon the exclusive ownership of the property by Mrs. Burche.

Schedule F. I do not find proof of any other indebtedness from Mrs. Wallach to Mrs. Burche, as contemplated by the direction in the order of reference to state a 6th account.

Schedule G shows the actual expenses incurred by the trustee in making the sale of the said property on the 8th day of December, 1873, and the payment of the same.

The only serious question raised before me as to this account is as to the payment of the trustee's commissions for making the sale. The deed of trust provides that the trustee shall receive or retain a commission of three per cent. upon the amount of the sale.

The proof shows that Mrs. Mellen, the beneficiary in the deed of trust under which the property was sold, furnished the money to pay the expenses of sale, and such taxes and assessments as
396 were paid; that said Kennedy, the trustee, had previously invested some money for her in a deed of trust note amounting to about four hundred dollars, and that in the settlement over the sale of the property in question here he took that note from her as part of his commissions, and received a part in money. The exact amount of the latter he does not state, but says he received his full commissions. It seems to me there can be no question that the delivery and receipt of the note in question was a valid payment of the trustee's commissions *pro tanto*, and that upon his testimony, which is not contradicted, the commissions were substantially paid as charged.

Schedule H shows the liens and encumbrances paid off and satisfied since the 8th of December, 1873, the date of the trust sale.

These payments appear to have been made out of the purchase money which Mrs. Burche paid, or was to pay, for the said property, as shown in the trustee's account of disbursements contained in Exhibit A. F. F. No. 1.

JAS. G. PAYNE,
Spec. Auditor.

Auditor's fees, $50.

397 *Schedule A.*

Statement of the liens and incumbrances on the property existing at the date of the death of Mrs. Susan L. Hewitt, the 15th of December, 1872.

Note of Mrs. Susan L. Wallach and Mrs. Catharine Burche, dated the 15th day of January, 1872, payable in five years, with interest at ten per cent. per annum, pay-

able quarterly, secured by a deed of trust of this property, to Jos. C. G. Kennedy—

Principal of note	5,000
Interest from October 15, 1872, unpaid, but not due.	
General taxes for the year ending June 30, 1873	347 79
Special assessment for improvements of D street along this property, assessed October 31, 1872, and bearing interest from that date at the rate of ten per cent. per annum	598 80

JAS. G. PAYNE,
Spec. Auditor.

398 *Schedule B.*

Account showing what portions of the liens and incumbrances in Schedule A were jointly chargeable to the separate account of Susan L. Wallach and what portion to the separate account of Catharine Burche.

Of the indebtedness secured by deed of trust to J. C. G. Kennedy of $5,000 and interest—	
One-half to Mrs. Wallach	2,500
One-half to Mrs. Burche	2,500 00
Of the general taxes for the year ending June 30, 1873—	
One-half to Mrs. Wallach	173 89½
One-half to Mrs. Burche	173 89½
Of the special assessment for the improvement of D street—	
One-half to Mrs. Wallach	299 40
One-half to Mrs. Burche	299 40

JAS. G. PAYNE,
Spec. Auditor.

399 *Schedule C.*

An account of the liens and incumbrances arising or created between the death of Mrs. Susan L. Hewitt, and the sale of the property under the deed of trust to Jos. C. G. Kennedy, December 8, 1873.

General taxes for the year ending June 30, 1874	335 28
Assessment for sewerage purposes	130 57
This assessment was paid by the trustee at a cost of 91.40, and was subsequently refunded.	
Interest accrued on the special assessment for improvement of D street	66 19
Interest accrued on general tax for year ending June 30, 1873	15 18
Interest accrued on the indebtedness secured by deed of trust to Kennedy, from Oct. 15, 1872, to Dec. 8, 1873	323 61

JAS. G. PAYNE,
Spec. Auditor.

400 *Schedule D.*

Showing the portions of indebtedness in Schedule C, chargeable, respectively, to Susan L. Wallach and Catharine Burche.

Of general taxes for the year ending June 30th, 1874—	
One-half to Mrs. Wallach	167 64
One-half to Mrs. Burche	167 64
Of the sewer assessment—	
One-half to Mrs. Wallach	
One-half to Mrs. Burche	
Of the interest on D street, special improvement tax—	
One-half to Mrs. Wallach	33 09½
One-half to Mrs. Burche	33 09½
Of the interest on general tax for year ending June 30, 1873—	
One-half to Mrs. Wallach	7 59
One half to Mrs. Burche	7 59
Of the interest accrued on deed of trust indebtedness, there is chargeable to Mrs. Wallach one-half, from October 15, 1873, to Dec. 8, 1873	36 80
And to Mrs. Burche, her one-half of the interest, from October 15, 1872, to December 8, 1873	286 81

JAS. G. PAYNE,
Spec. Auditor.

401 *Schedule E.*

Showing the sum chargeable to said Susan L. Wallach in favor of said Catharine Burche, on account of the use and occupation of said property by said Susan L. Wallach, from the 15th day of December, 1872, until the 15th day of January, 1874.

For one-half the value of the use and occupation of the said property from the death of Mrs. Hewitt on the 15th of December, 1872, to the delivery of deed from Jos. G. C. Kennedy, trustee, to Catharine Burche, December 24, 1873, 12 mos. 9 days, at $50 per mo	615
From the 24th of December, 1873, Mrs. Wallach would appear to be the tenant of Mrs. Burche, and liable to her for the full rent which would be	70

JAS. G. PAYNE,
Spec. Auditor.

402 *Schedule F.*

I do not find Mrs. Wallach indebted to Mrs. Burche on any other account which would furnish a rebate or set off against her interest in the proceeds of the said property.

JAS. G. PAYNE,
Spec. Auditor.

403 *Schedule G.*

Showing the actual expenses incurred by the trustee in making the sale of the said property on the 8th day of December, 1873, and the payment of the same.

Commissions of auctioneer upon amount of sale, paid in money by the trustee	183 10
Corporation duty paid by auctioneer and paid to him by trustee	41 27
Publishing advertisement of said sale in "Daily National Republican" paid by the trustee	33 75
Commission of trustee as prescribed by deed of trust and paid to him, partly in money and partly in notes, as set forth in the accompanying report	495 28

JAS. G. PAYNE,
Spec. Auditor.

404 *Schedule H.*

I do not find that any liens or incumbrances on said property have been paid off and satisfied by said Catharine Burche since the 8th day of December, 1873, except in so far as she may be said to have contributed indirectly to the following payments made by or for the trustee as appears in account filed and marked Exhibit A. F. F. No. 1 to the complainant's deposition in No. 3571.

Special assessments for the improvement of D street, with interest to Dec. 22, 1873		667 39
General taxes for the year ending June 30, 1873, and interest to Dec. 22, 1873		364 42
General taxes for the year ending June 30, 1874	335 28	
Less rebate for payment prior to July 1, 1874	15 08	
		320 20
Joint interest on the $5,000 trust debt from Oct. 15, 1873, to Dec. 22, 1873		93 74
		1,445 75

JAS. G. PAYNE,
Spec. Auditor.

405 In the Supreme Court of the District of Columbia.

CATHARINE BURCHE } *vs.* SUSAN L. WALLACH. } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH } *vs.* CATHARINE BURCHE. } No. 4423. Eq. Doc. 15.

Notice is hereby given that on Monday, the 11th day of November, 1878, at 2 o'clock p. m., I shall proceed to the hearing of these

causes, under the order of reference to me as special auditor, at which time all parties interested may be present

JAS. G. PAYNE,
Special Auditor, Webster Law Building.

JOS. H. BRADLEY, *Sol'r for Burche.*
PIKE & MILLER, *Sol'rs for Wallach.*
L. G. HINE, *Sol'r for Mrs. Mellen.*

406 In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH. } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE. } No. 4423. Eq. Doc. 15.

Notice is hereby given that on Thursday, the 26th day of December, 1878, at 10 o'clock a. m., I shall proceed to the hearing of these causes under the order of reference to me as special auditor, at which time all parties interested may be present.

JAS. G. PAYNE,
Spec. Auditor, No. 470 La. Ave.

JOS. H. BRADLEY, *Sol'r for Burche.*
PIKE & MILLER, *Sol'rs for Wallach.*
L. G. HINE, *Sol'r for Mrs. Mellen.*

Service acknowledged Dec. 21st, 1878.
JOSEPH MILLER & L. H. PIKE, *for Mrs. Wallach.*
L. G. HINE, *Sol'r for Mellen.*

Jos. H. Bradley, with notice that he will necessarily be absent from the city from the 23 Dec. to the 2d January, 1879, on appointments already made, and a request that the meeting be postponed to this last date.

407 In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH. } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE. } No. 4423. Eq. Doc. 15.

Take notice that the hearing of the above-named cases is post-

poned until after January 2, 1879, on account of the absence of counsel.

JAS. G. PAYNE, *Spec. Aud.*
Per J. H. T.

JOS. H. BRADLEY, *Sol'r for Burche.*
Messrs. PIKE & MILLER, *Sol'rs for Wallach.*
L. G. HINE, Esq., *Sol'r for Mrs. Mellen.*

Service acknowledged this 24th day of Dec., 1878.
L. G. HINE, *for Mellen.*
JESUP MILLER, *for Wallach.*

408 In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH. } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE. } No. 4423. Eq. Doc. 15.

Notice is hereby given that on Monday, January 13th, 1879, at 11 o'clock a. m., at my office, I will proceed to a further hearing of above-named cases.

JAS. G. PAYNE, *Spec. Aud.*
Per J. H. TAYLOR.

JOS. H. BRADLEY, *Sol'r for Burche.*
PIKE & MILLER, *Sol'r for Wallach.*
L. G. HINE, Esq., *Sol'r for Mrs. Mellen.*

409 In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH. } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE. } No. 4423. Eq. Doc. 15.

Notice is hereby given that the audit in these cases will be continued on Monday, January 20th, 1879, at 1 o'clock p. m., for the purpose of receiving any further offers of proof and argument of counsel.

JAS. G. PAYNE,
Special Auditor.

Service ack. Jan. 17, '79.

L. G. HINE,
For Mrs. Mellen.
JOS. H. BRADLEY,
For Burche.

Service acknowledged Jan. 16, 1879.

JESUP MILLER,
Sol'r for Wallach.

410 In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH. } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE. } No. 4423. Eq. Doc. 15.

Notice is hereby given that the final hearing in the above-named cases is posponed to Thursday, Feb. 6, '79, at 12 o'clock m.

JAS. G. PAYNE,
Special Auditor.

Service ack'd Feb. 4, 1879.

L. G. HINE,
For Mellen.

NOVEMBER 16, 1878.

411 Present: Joseph H. Bradley and L. H. Pike, Esq'rs, and Mrs. Catharine Burche.

Deposition of A. F. Fox. Filed May 5, 1879.

A. F. Fox made a statement in explanation of the items contained in Exhibit A. F. F. No. 1 to complainant's deposition in cause No. 3571, as follows:

The sewer tax estimated at $128.22 was subsequently paid at a cost of $91.40, and was finally refunded.

The Sixth street improvement tax has never been paid. It was not assessed when this account was made out, and was therefore estimated. The other items of taxes and assessments were paid by me. I think Mr. Kennedy furnished the money or checks. The same as to the auctioneer's commission, corporation duty, and advertising bill.

MONDAY, *January* 13, 1879.

Hearing resumed pursuant to notice.

Present: Jos. H. Bradley, Thos. Jesup Miller, and L. G. Hine, Esq'rs, of counsel, and A. F. Fox, witness. Mr. Fox was discharged from attendance until further notice.

412 Mr. Jos. C. G. KENNEDY afterwards appeared, and being examined by the special auditor, stated that he distributed

generally the fund arising from the sale of the property in question, but has no distinct recollection as to the payment of taxes and assessments charged in exhibit.

With respect to the trustee commission charged, he states that he afterwards agreed with Mrs. Mellen to take a note secured by a deed of trust, it being an investment which he had previously made for her. He does not recollect the amount of the note now, but thinks it was in the neighborhood of four hundred dollars. The note was considered as of value at that time, and he probably could have collected or made it had he exerted himself to do so. He has not collected it, or any part of it. He considered the taking of this note a matter exclusively between himself and Mrs. Mellen.

FEBRUARY 6, 1879.

Hearing resumed.

Present: Messrs. T. J. Miller, L. G. Hine, and S. T. Thomas.

Deposition of R. W. Burche.

413 RAYMOND W. BURCHE being duly sworn as a witness, deposed as follows:

(Examined by Mr. THOMAS:)

I am acquainted with the parties to these proceedings. I remember the sale of this property, about the 8th of December, 1873. I remember the wooden pavement laid in 6th street, between Louisiana avenue and F street. The part of this pavement in front of the property in question here was laid at the time of the sale; I am positive of that.

Cross-examined by Mr. MILLER:

I am the husband of Catharine Burche, a party to these suits, and have heretofore testified in the cause. My mother lived on 6th street near this property at the time of the sale, and had for many years previous. During my mother's lifetime, I had been in the habit of passing this property on average of about twice a week for twenty years.

Q. During the time of the improvements by the board of public works, were you at any time blockaded from routes to your mother's house?

(Objected to, as immaterial, vague, & uncertain.)

414 A. I never was blockaded from getting there, but during the improvements and excavations I do not know that I could always get to the door, but if I could not, I always stopped my carriage at one end of the street and walked.

I cannot state the times or dates when I was so stopped.

I have no memorandum to recall to my memory the fact, that at the 8th of December, 1873, this pavement was completed.

Direct examination resumed.

Previous to the sale, and while these improvement were going on,

Mrs. Wallach called my attention to the fact that the contractors were carrying the old material off, and wanted me to find out whether it was to be paid for or not.

Q. Was not D street adjacent to the property also improved?

A. Yes, sir; I don't know when that was done, it was previous to the sale.

415 Q. Was it not in relation to that pavement that Mrs. Wallach spoke to you about the contractors carrying off the old material?

A. Yes, sir; about that also.

Q. Did you not state a moment ago, in your redirect testimony, that this conversation of Mrs. Wallach's was about 6 months prior to the sale?

A. I think I said that to Mr. Hine, but not in the giving of my testimony.

Q. How long prior to the sale did the street become passable?

A. I am not able to give dates. I would not care to approximate the date, because we might find the exact date. I can't approximate, but it was before the sale.

Q. Do you not know that it was less than two months prior to the sale?

A. I am unable to say whether it was two months, but it was more or less.

416 Direct again:

Coming to the sale I came into Washington with my wife in a carriage; put the carriage up at livery and walked from Mr. Clagett's office to the property. I drove my carriage along 6th street that morning over that pavement and to my mother's house, on the opposite side of 6th street, and about the centre of the square, between D and E streets. The pavement was completed up to that point and beyond at that time. R. W. BURCHE.

Subscribed and sworn to before me, February 6, 1879.

JAS G. PAYNE, *Spec. Auditor.*

417 EXHIBIT J. G. P. No. 1.

WASHINGTON CITY, FOLIO 317.

William Hewitt to the District of Columbia, Dr.

Designation and assessed value of real estate taxed:

Square.	*Lot.*	*Value of Lot.*	*Value of Imps.*	*Remarks.*
457	of 1	$6,588	$5,000	
	of 2	5,176		
All.—J. C. E.				$16,764

For tax on real estate for the year ending June 30, 1874 -- $335 28
Less abatement of three quarters of one per cent. per month to July 1st, 1874 ---------- 15 08

$320 20

Received payment.

L. CLEPHANE, *Collector.*
By MERCHANT.

418 EXHIBIT J. G. P. No. 2.

Of Lot 2, Square No. 457, assessed in the name of William Hewitt to the District of Columbia, Dr.:

To amount of tax-lien certificate No. 5034, issued for amount due for taxes for year ending June 30th, 1873	$123 59
To interest at the rate of ten per cent. per annum	6 70
To amount required to redeem	$130 29

Received payment. L. CLEPHANE, *Collector.*
A. P. C. By MERCHANT.

EXHIBIT J. G. P. No. 3.

Of Lot 1, Square No. 457, assessed in the name of William Hewitt, to the District of Columbia, Dr.:

To amount of tax-lien certificate No. 5033, issued for amount due for taxes for year ending June 30th, 1873	$224 20
To interest at the rate of ten per cent. per annum	12 14
To amount required to redeem	$236 34

Received payment. L. CLEPHANE, *Collector.*
By MERCHANT.

419 EXHIBIT J. G. P. No. 4.

Book 1, folio 169.

OFFICE OF THE BOARD OF PUBLIC WORKS, ASSESSOR'S OFFICE,
(Columbia Building, Four-and-a-half Street,
Room No. 6, Second Floor,)
WASHINGTON, D. C., *Oct.* 31*st*, 1872.

WM. HEWITT: You are hereby notified that of lot No. 2, square No. 457, in Washt. city, has been assessed for special improvements, said lot fronting 56.10½ feet on the —— side of D, from 6 to 11.

Duplicate.

Carriageway and footway.
Water services.
Sewer services.
Gas services.

Cr.	$271 70
By old material, to interest, 14 mo., to date, 1873, Dec. 29	34 03
	$325 73

Received payment. GEORGE W. BEALL,
Sup't of Assessments.

420 EXHIBIT J. G. P. No. 5.

Book 1, folio 169.

OFFICE OF THE BOARD OF PUBLIC WORKS, ASSESSOR'S OFFICE,
(Columbia Building, Four-and-a-half Street,
Room No. 6, Second Floor,)
WASHINGTON, D. C., *Oct.* 31*st*, 1873.

WILLIAM HEWITT: You are hereby notified that of lot No. 1, square No. 457, in Washt. city, has been assessed for special improvements, said lot fronting 59.10½ feet on the —— side of D, from 6 to 11.

Duplicate.

Carriageway and footway.
Water services.
Sewer services.
Gas services.

Cr.	$307 10
By old materials, to interest 10 pr. ct., 14 mos., to date, Dec. 29, 1873	35 83
	$342 93

Received payment. GEO. W. BEALL,
Sup't of Assessments.

421 EXHIBIT J. G. P. No. 6.

WASHINGTON, D. C., *Nov.* 27, 1873.

Mr. Kelly & Gatchel to the National Republican, Dr.

For advertising as follows:

Sale J. C. G. Kennedy, trus., 9 sq., 9 t. $33 75

Received payment. W. H. POPE,
For the Proprietor.

EXHIBIT J. G. P. No. 7.

No. 118, vol. A, 1879.

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
WASHINGTON, D. C., *January* 23, 1879.

To the Engineer Commission, D. C.

SIR: In reference to communication, No. 118, E. O., vol. A, 1879, I have the honor to report that the reports of the special superintendents state that 2,632 sq. y'ds. of wood pavement were laid on 6th street west, bet. La. avenue and F street north, during the month of October, 1873, none during November, 1873, and 1,351 sq. y'ds during December, 1873; that I have searched the records, but can find no statement as to the exact date when any particular
422 part of said work was done.

That the original assessment for the improvement of 6th street was approved by the Commissioners of D. C., May 12, 1875, and

was completed and entered upon the books July 15, 1875, and the bills issued and delivered July 15, 1875.

That the revision of said assessment was approved by the Commissioners of D. C. July 30, 1878.

That the amount of the original assessment against of lot 1, square 457, was $462.16, which was reduced by the revision of the assessment to $293.80.

Very respectfully, WM. OSCAR ROOME, *Clerk.*

Exhibit A. F. F., No. 1. Filed with Auditor's Report.

WASHINGTON, D. C., *December* 22, 1873.

Joint encumbrances on and expenses of sale of property, corner of Sixth and D street northwest.

D street imp. tax, 598.70; int. to Dec. 22, 68.69	$667	39	
General taxes, 1872, '73, 344.79; int. to Dec. 22, 16.63	364	42	
Sewer tax (estimated)	128	22	
423 General taxes for 1873, 74	335	28	
Sixth street imp. tax (estimated)	350		
Trustee fee	495	28	
Corporation duty	41	27	
Auctioneer com.	183	10	
Advertising	33	75	
Int. on $5,000 from Oct. 15 to Dec. 22	93	74	
Am't of note	5,000		
			$7,692 45
Am't of sale			$16,509 66
Deduct as above			7,692 45
			2)8,817 21
			$4,408 60

424 *Exceptions by R. R. Mellan to Report. Filed May 28th, '79.*

In the Supreme Court of the District of Columbia, May 28th, '79.

CATHARINE BURCHE *vs.* SUSAN L. WALLACH. } No. 3571. Eq. Doc. 13.

and Consolidated

SUSAN L. WALLACH *vs.* CATHARINE BURCHE. } No. 4423. Eq. Doc. 15.

And now, May 28, 1879, comes defendant, Rebecca R. Mellen, by Mr. L. G. Hine, her solicitor, and excepts to the report of James G. Payne, Esq., special auditor, filed herein, May 5, 1879, because

among other things he has not stated an account between this exceptant and Susan L. Wallach and Catharine Burche, in relation to moneys advanced by the former to the latter, subsequent to December 8th, 1873. Wherefor she prays that said report may be recommitted to said special auditor, with directions to state such an account, &c.

REBECCA R. MELLEN
By L. G. HINE, *her Solicitor.*

425 *Recommitted to Auditor. Filed Oct. 10th, '79.*

In the Supreme Court of the District of Columbia.

SUSAN L. WALLACH
vs.
CATHARINE BURCHE. } No. 4423. Eq. Doc. 13.

and

CATHARINE BURCHE
vs.
SUSAN L. WALLACH. } No. 3571. Eq. Doc. 15.

This cause came on to be heard upon the exception of Mrs. Mellen to the report of special auditor Payne, and was argued by counsel for the respective parties, upon consideration thereof, it is now, October 10, 1879, ordered this cause be, and is hereby, recommitted to the said auditor, with directions to state an account between Mrs. Mellen and Mrs. Wallach and Mrs. Burche, in respect of, and to ascertain and report, how much of the $3,200, advanced by Mrs. Mellen to Mrs. Burche, was applied in relieving the property described in the pleadings of liens existing thereon, on the 8th day of December, 1873, and that he report within twenty days from this date.

By the court: MACARTHUR, *Justice.*

426 *Report of Auditor. Filed Oct. 30, '79.*

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

This cause was recommitted to me with directions "to state an account between Mrs. Mellen and Mrs. Wallach and Mrs. Burche, in respect of, and to ascertain and report how much of the thirty-two hundred dollars advanced by Mrs. Mellen to Mrs. Burche, was applied in relieving the property described in the pleadings of liens existing thereon, on the eighth day of December, eighteen hundred and seventy-three."

No additional proof has been submitted or offered by the
427 parties to this cause. It is urged in behalf of Mrs. Mellen and Mrs. Burche, that the proofs heretofore taken established a contract between these two ladies and Mrs. Wallach, the effect of which is to make the assessment of the special improvement of Sixth street, referred to in my former report, a lien upon the property to be paid out of the money advanced by Mrs. Mellen.

Without repeating here the discussion of my former report upon this particular assessment, it is sufficient to say that I then excluded it from the liens existing upon the property at the time of the trust sale.

The proof of a contract between Mrs. Mellen, Mrs. Burche, and Mrs. Wallach, is in brief as follows:

That Mrs. Mellen had seperate interviews with these other two ladies prior to the first sale, in which they severally expressed a desire to purchase the property, provided money sufficient could be procured to pay off the liens upon the property.

That Mrs. Mellen expressed to each of them her willingness in,
case either should buy, to advance the money necessary for
428 that purpose in addition to the loan she already held upon the property.

Mrs. Burche did buy at the trust sale, and Mrs. Mellen did advance, as she claims, an additional sum of thirty-two hundred dollars for the purpose of relieving the property.

I do not [think] the proof establishes any such contract between these three ladies as has been claimed. The liens were not enumerated or specified by any of the parties in their conversations or negotiations, except that Mrs. Wallach mentioned the sum of seven hundred dollars as being about what would be necessary for the purpose of discharging them, referring to the tax liens.

If there is any proof to be gathered from these conversations at all as to what liens or charges were intended by these parties, the sum named by Mrs. Wallach would certainly exclude the Sixth street assessment, as there was more than seven hundred dollars of other tax liens upon the property at the time.

In "Schedule A" of this report I have stated the portion
429 of the thirty-two hundred dollars advanced by Mrs. Mellen, which was applied to relieve the property of liens as I find them to have existed on the property on the eighth of December, eighteen hundred and seventy-three.

In "Schedule B" I have shown the portion of "Schedule A" properly chargeable to Mrs. Burche.

And in "Schedule C" the portion chargeable to Mrs. Wallach.

At the request of counsel I have stated an alternative "Schedule D," showing the condition of these accounts, adding to them the special assessment for the improvement of Sixth street.

Fee, $15.00 JAS. G. PAYNE, *Auditor.*

Oct. 29, 1879.

430 *Schedule A.*

Showing how much of the $3,200 advanced by Mrs. Mellen to Mrs.

Burche was applied to relieve the property of liens existing thereon December 8th, 1873.

Interest due and unpaid on the $5,000 trust debt		323 61
General taxes for the year ending June 30, 1873	347 79	
Interest to Dec. 22, 1873	16 63	
		364 42
General taxes for the year ending June 30, 1874	335 28	
Less rebate	15 08	
		320 20
Special assessment, D street	598 70	
Interest to Dec. 22, 1873	68 69	
		667 39
Expenses of trustee's sale, schedule G, former report		753 40
		$2,429 02

JAS. G. PAYNE, *Auditor*

431 *Schedule B.*

Showing the portion of the charges contained in Schedule A chargeable to Mrs. Burche.

Interest on the $5,000 trust debt	$286 81	
One-half of the general taxes for year ending June 30, 1873, and interest	182 21	
One-half of the general taxes for year ending June 30, 1874, and interest	160 10	
One half of the special assessment for D street, and interest	333 70	
One-half of the expenses of trustee's sale	376 70	
		$1,339 52

JAS. G. PAYNE, *Auditor.*

432 *Schedule C.*

Showing the portion of the charges contained in Schedule A, chargeable to Mrs. Wallach.

Interest on the $5,000 trust deed	$36 80	
One-half of the general taxes for the year ending June 30th, 1873, and interest	182 21	
One-half of the general taxes for the year ending June 30th, 1874, less rebate	160 10	
One-half of the special assessment for D street and interest	333 70	
One-half of the expenses of trustees sale	376 70	
		$1,089 51

JAS. G. PAYNE, *Auditor.*

433 *Schedule D.*

Showing the amount of the money advanced by Mrs. Mellen, properly chargeable to the said Mrs. Burche and Mrs. Wallach, respectively, if the assessment of the improvement of 6th street be included.

Mrs. Burche, Dr.:		
To amount from Schedule B----	$1,339 52	
Add ½ of special assessment 6th street----------	146 90	
		$1,486 42
Mrs. Wallach, Dr.:		
To amount from Schedule C----	$1,089 51	
Add ½ of special assessment 6th street----------	146 90	
		1,236 41
Total amount due to Mrs. Mellen on the above basis---		$2,722 83

JAS. G. PAYNE, *Auditor.*

434 *Decree for Sale. Filed Jan. 3, '80.*

In the Supreme Court of the District of Columbia.

CATHERINE BURCHE *vs.* SUSAN L. WALLACH *et al.* } No. 3571. Ex. Doc. 13.

and Consolidated.

SUSAN L. WALLACH *vs.* J. C. G. KENNEDY *et al.* } No. 4423. Ex. Doc. 15.

These causes coming on to be heard at this term of the court upon the reports of the auditor and other proceedings hereinbefore had, was argued and submitted; whereupon, and upon consideration thereof, it is, this third day of January, adjudged that the sum of $5,000 due to Rebecca P. Mellen, and the further sum of $2,429.$\frac{92}{100}$ afterwards advanced by Rebecca Mellen for the payment of interest in arrears, taxes, and other encumbrances constituting the only lien upon the interests and estates of Catharine Burche and S. Lavinia Wallach in the parcel of land mentioned and described in the proceedings on the eighth day of December, 1873; that the
435 further sum of $970.$\frac{98}{100}$ is due said Mellen from said Burche and chargeable upon her share in said property; that the sum of $3,975.$\frac{49}{100}$ became due on December 8th, 1873, to Susan Lavine Wallach, with interest at the rate of eight per cent. per annum, for her share of the net proceeds of the sale of said property in December 8th, 1873.

Now, it is, this third day of January, A. D. 1880, ordered, adjudged, and decreed, that the said parcel of land and premises par-

ticularly described in these proceedings and all the interest and estate therein of all the parties to this cause be, and the same hereby is, directed to be sold; that A. Thomas Bradley and Thomas Jesup Miller be, and are hereby, appointed trustees to make such sale; that the manner of their proceedings shall be as follows: after giving several bonds, with security to be approved by the court in the sum of $12,000 for the faithful discharge of the duties imposed upon them by the decree and the due performance of every duty that may be imposed upon them by any future decree, they shall give at least ten days' notice
436 by advertisement in the Evening Star of the time, place, and terms of sale; that the terms of sale shall be one-fourth of the purchase money in cash, of which they shall require a deposit of $500 at the time of sale, balance in four equal instalments in notes of the purchaser at 6, 12, 18, & 24 months after date, with interest from date, or all in cash, at the purchaser's option; the deferred payments, if any, to be secured by a lien upon said property; and it is further ordered and decreed that upon making such sale the said trustees shall report their proceedings to this court and bring the money and notes which they shall receive into court to be distributed under the further order of the court; and it is hereby further ordered and decreed that all questions affecting interest on the indebtedness to the defendant, Mellen, are hereby reserved for the further order of the court, and no judgment thereon is here given.

By the court. MACARTHUR, *Justice.*

437 *Trustee's Bond. Filed Jan. 5, '80.*

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
S. LAVINIA WALLACH *et al.* } No. 3571. Eq. Doc. 13.

S. LAVINIA WALLACH
vs.
CATHARINE BURCHE. } No. 4423. Eq. Doc. 15.

Know all men by these presents, that we, A. Thomas Bradley and Thomas Jesup Miller, trustees, and Charles C. Duncanson are held and firmly bound unto the United States of America in the sum of twelve thousand dollars ($12,000), to which payment, well and truly to be made, we bind ourselves, and every of us, our and every of our heirs, executors, and administrators, firmly by these presents. Signed and sealed on this fifth day of January, A. D. 1880.

Whereas the above bounden A. Thomas Bradley and Thomas Jesup Miller have been appointed trustees in the above-entitled causes by a decree bearing date on the 3d day of January,
438 A. D. 1880, to make sale of the certain parcel of land particularly described in the proceedings:

Now, the condition of the above obligation is such that if the above bounden A. Thomas Bradley and Thomas Jesup Miller shall in all respects well and truly perform their duties as such trustees,

and shall perform every other duty that may be required of them by the court in the above-entitled causes, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hand and seals, this 5th day of January, A. D. 1880.

A. THOS. BRADLEY. [SEAL.]
CHAS. C. DUNCANSON. [SEAL.]
TH. JESUP MILLER. [SEAL.]

JAN'Y 5, 1880.

Approved.
MACARTHUR, *Justice.*

439 *Bond of Bradley, Trustee. Filed Jan.* 7, '80.

In the Supreme Court of the District of Columbia, the — day of ——, 18—.

CATHARINE BURCHE *vs.* S. LAVINIA WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

S. LAVINIA WALLACH *vs.* CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

Know all men by these presents, that we, A. Thomas Bradley, Thomas Jesup Miller, and Joseph H. Bradley, all of the District of Columbia, acknowledge ourselves indebted to the United States of America in the penal sum of twelve thousand dollars, for the payment of which we bind ourselves, and every of our heirs, executors, and administrators, jointly for severally, for and in the whole. Sealed with our seals and dated the day and year aforesaid.

Whereas the said A. Thomas Bradley and Thomas Jesup Miller have been duly appointed trustees to make sale of certain
440 real estate mentioned in the proceedings in the above-entitled causes:

Now, the condition of the above obligation is such, that if the above bounden A. Thomas Bradley shall well and truly perform the duties imposed on him, and shall in all things obey such order and decree as this court shall make in the premises, then the above obligation to be void and of no effect; else to be in full force and virtue.

A. THOMAS BRADLEY. [SEAL.]
TH. JESUP MILLER. [SEAL.]
JOS. H. BRADLEY. [SEAL.]

Approved.
JAMES, *Justice.*

441 *Trustees' Report. Filed Feb.* 24, '80.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
S. LAVINIA WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

S. LAVINIA WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

The report of A. Thomas Bradley and Thomas Jesup Miller, trustees, heretofore appointed by a decree of this court to sell the real estate mentioned in the above-entitled causes, respectfully shows that after filing the bonds, as required by the terms of the decree, they caused the said property to be advertised for sale at public auction on Tuesday, the 20th day of January, A. D. 1880, and they annex hereto a copy of said advertisement as printed and published in the "Evening Star," a newspaper printed and published in the city of Washington.

Advertisement of Sale.

Duncanson Bros., Auct's.

442 Trustees' sale of large and valuable property, corner of Sixth and D streets N. W., with the buildings thereon.

By virtue of a decree passed in the causes No. 3571 and No. 4423, equity, in the supreme court of the District of Columbia, we will sell, on Tuesday, the 20th day of January, A. D. 1880, at 3 o'clock p. m., in front of the premises, all that certain parcel of land situate in the District of Columbia, and known as those parts of lots Nos. 1 and 2, in square No. 457, which are contained in the following metes and bounds: Beginning for the same at the northwest corner of 6th and D streets northwest, running thence north fifty-four $\frac{11}{12}$ feet; thence west one hundred and sixteen $\frac{9}{12}$ feet; thence south to D street fifty-four $\frac{11}{12}$ feet; thence east with D street one hundred and sixteen $\frac{9}{12}$ feet to the place of beginning, together with the appurtenances.

Terms: One-fourth of the purchase money in cash, of which $500 will be required to be deposited by the purchaser at the time of *of* sale; balance at six, twelve, eighteen, and twenty-four months, or all in cash, at purchaser's option. The deferred payments, if
443 any, to bear interest from the sale, and to be secured by a lien upon the property sold.

A. THOMAS BRADLEY,
452 D St. N. W.,
TH. JESUP MILLER,
501 D St. N. W.,
Trustees.

Jan. 6-d&ds.

The above sale is postponed until Monday, the 26th day of January, A. D. 1880, at same hour and place.

A. THOMAS BRADLEY,
452 D St. N. W.,
TH. JESUP MILLER,
501 D St. N. W.,
Trustees.

Jan. 21-d&dbs.

That at the time and place appointed for the sale a postponement was made until Monday, the 26th day of January, A. D. 1880, (as also appears from the copy of said advertisement,) and this was done because of the unavoidable absence from the city of one of the trustees; that at the time and place mentioned, to wit, Monday, the 26th day of January, A. D. 1880, they attended on the premises with their auctioneer and found several notices posted on the property, in which certain persons claimed to hold
444 the property under a written lease, and these notices aforesaid were promptly removed by one of the trustees. A good company being present, they directed the auctioneer to offer the property for sale in accordance with the terms of the decree, when one William P. Wood announced to the company that he held that property under a lease which would not expire until some time in July, 1882, the validity of such a lease was immediately denied by one of the trustees with the approval of the others, and the sale was commenced, but whether it was owing to the claim of said Wood just referred to, or other causes unknown to the trustees, the bidding was very slow, and the highest bid obtained was only eleven thousand dollars, while the property is assessed at fourteen thousand seven hundred and sixty-six dollars, the trustees not feeling justified in selling the property at a price so much less than its assessed value, made their reserved bid of fourteen thousand five hundred dollars, and there being no advance on that the property was withdrawn from sale.

The trustees further report *report* that in their opinion the
445 interests of all parties will be furthered by a private sale, and they therefore request an order may be passed permitting them to receive private bids for the purchase of the property referred to, and directing them to refer the same to the court for its approval before accepting any of them. All of which is respectfully submitted.

A. THOS. BRADLEY,
THOS. JESUP MILLER,
Trustees.

Sworn to by A. Thos. Bradley, Feb'y 24, 1880, before me.
R. J. MEIGS, *Clerk.*
By M. A. CLANCY, *Ass't Clerk.*

446 *Order Permitting Trustee to Receive Bids. Filed Feb.* 26, '80.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
S. LAVINIA WALLACH *et al.* } No. 3571. Eq. Doc. 13.

S. LAVINIA WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

Ordered by the court, this 26 day of February, A. D. 1880, that the trustees, heretofore appointed to make sale of the real estate mentioned in the above entitled causes, be, and they are hereby, authorized to receive private bids for the purchase of said real estate, and to report the same to the court for such action as it may deem right and proper.

CHAS. P. JAMES, *Justice.*

447 *Order upon Wm. P. Wood. Filed Feb.* 28, '80.

In the Supreme Court of the District of Columbia, the 26th day of February, A. D. 1880.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and Consolidated.

SUSAN L. WALLACH
vs.
CATHARINE BURCH *et al.* } No. 4423. Eq. Doc. 15.

Upon hearing the trustees' report heretofore filed in this cause, and it appearing that the conduct of William P. Wood, as related by said report, is a contempt of the authority of this court, and its decrees, it is now, this 26th day of February, A. D. 1880, ordered that the said William P. Wood show cause on or before the 3rd day of March, A. D. 1880, why he should not be proceeded against for a contempt.

CH. P. JAMES, *Justice.*

448 *Answer of W. P. Wood. Filed Mar.* 3, '80.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

The answer of William P. Wood to a rule issued against him in

the above cause to show why he should not be proceeded against for contempt.

To the honorable the judges of the supreme court of the District of Columbia, in equity sitting:

Respondent, for answer to said rule, respectfully says that he has been guilty of no action or thing in contempt of this honorable court in the premises.

On the day that the property mentioned in these causes was offered for sale respondent caused to be posted on said premises a notice in writing, to the effect that he and one I. R. Blumen-
449 berg had a lease of the property for three years from the 5th day of July, 1879, subject to the order of court, and that no order had been made affecting said lease, and that they would claim possession of said property under said lease during the full end and term thereof.

A copy of said notice is filed herewith as part hereof.

MONDAY, *Jan.* 26, '80.

To whom it may concern:

Due notice is hereby given that the undersigned are in possession of a legal rental lease of the premises known as No. 402 Sixth street N. W., for a period of three (3) years, dating from July 5, 1879, to July 5, 1882, and subject to order of the court, and no order has been made effecting said lease.

This notice is given so that the purchaser or any one intending to purchase may be duly informed that we shall claim said premises for the full term of said lease.

(Signed) WM. P. WOOD.
I. R. BLUMENBERG.
Per PRATHER.

450 Said lease was made by, as agent, Albert F. Fox, who claims to be authorized by all the parties interested in said property, to lease the same, and affiant believes he is. He prays that a copy of said notice, and said lease may be read as part of this answer. All he did was to post said notice, and call attention to its contents at the time of sale, and he denies all allegations in the report of the trustees appointed to make said sale which is or may be in conflict with the foregoing statement of facts. Respondent did not intend to interfere with or prejudice the sale, and he does not believe that what he did had any tendency whatever in that direction. He simply wished to *to* reserve his rights as a tenant of said property, and to inform the purchaser of the exact state of facts. Nothing more. He is informed he had the right to do this, and that the doing of it is in no sense a contempt of the authority of the court.

He therefore prays that said rule may be discharged and
451 that he may recover his costs in this behalf most unjustly expended.

DISTRICT OF COLUMBIA, *Washington County.* } *to wit:*

William P. Wood, the respondent mentioned in the foregoing answer, being duly sworn, says, upon oath that he has read said answer, and knows its contents, and that the matter therein stated upon his own knowledge are true, and those therein stated upon information derived from others he believes to be true.

WILLIAM P. WOOD.

Subscribed and sworn to before me, this 3d day of March, 1880.

A. C. RICHARDS, *J. P.* [SEAL.]

452 *Motion for Rule to Show Cause, &c. Filed Mar.* 25, '80.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE *vs.* S. LAVINIA WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

S. LAVINIA WALLACH *vs.* CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

And now, March 25, 1880, comes Catharine Burche, Susan L. Wallach and Rebecca R. Mellen, by their respective solicitors, and move the court for a rule on William P. Wood and Israel Rudolph Blumenberg to show cause why they and each of them should not be dealt with as for a contempt of this court in interfering with Messrs. Bradley and Miller, trustees, in a sale of the property mentioned and described in the pleadings and proceedings in these cases.

JESUP MILLER &
L. H. PIKE,
For S. L. Wallach.

L. G. HINE,
S. T. THOMAS,
For R. R. Mellen.

JOS. H. BRADLEY,
Per T.,
For Mrs. Burche.

453 *Affidavit of R. L. Wallach in Support of Motion. Filed Mar. 25, '80.*

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
S. LAVINIA WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

S. LAVINIA WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

RICHARD L. WALLACH, being duly sworn, deposes and says:

I am a member of the bar of this court. I am the son of Mrs. Susan L. Wallach, one of the parties to these suits. On behalf of my mother I was present at the time and place of the offer of the trustees to sell the property mentioned in these proceedings.

I saw the notices posted on the property purporting to be signed "Wm. P. Wood and R. Blumenberg, per Prather," referred to in the report of Messrs. A. Thomas Bradley and Thomas Jesup Miller, trustees, herein filed. I recognize the copy of said notice appended to the answer of Wm. P. Wood to the rule heretofore issued against him in this matter as a true copy of the notice which
454 was conspicuously posted on said property on the day it was offered for sale. I was present immediately in front of said premises, and heard said Wood give public notice to the company present, just before the auctioneer began to cry the sale, that he had a lease on the property proposed to be sold, which would not expire until July 4, 1883; that he proposed to hold possession of said premises until the expiration of said lease. I have reason to believe, and do believe, that said Wood and Blumenberg have no valid lease upon said premises, as they pretend to have, and that no such lease as they claim to have was ever executed by the owners of said property, or by any authorized agent or attorney for them, or either of them. I am informed and believe, and do believe, that a certain Albert F. Fox, who was employed by Mrs. Burche, one of the parties in interest, for the purpose of collecting the rents of said property, assumed to let said property in his own name to said Wood & Blumenberg by a written memorandum, and that if it is not stipulated in the face of said memorandum that the same
455 was executed subject to the decrees and orders in these suits affecting the title to said property. Fox notified and fully explained to said Wood and Blumenberg that the said property was in litigation, and that their tenure would cease on a sale of the property under final decree. I have reason to believe, and do believe, that the declaration of said Wood on the day of said proposed sale, to the effect that he had a lease on said property, was made for the purpose of impairing or defeating said sale, and that the said Wood and Blumenberg are acting in behalf of some person or persons un-

known to affiant, with a view to impair the sale of said property, to the end that it may be purchased at a price much less than its worth, to the prejudice of the partice interested in the proceeds of the sale. I have reason to believe, and do believe, that the declaration of Wood aforesaid, and the posting of the notices upon said property mentioned in the report of the trustees, had the effect of preventing an advantageous sale thereof; that persons desiring to purchase said property want immediate possession, and are not likely
456 to buy if there is probability of a law-suit for possession; that said Wood and Blumenberg are committing waste upon said property; that since the time said trustees offered said property said Wood and Blumenberg have altered one of the windows of the improvements on said property into a doorway, and have thereby done, as affiant is informed and believes, lasting injury to the freehold; that they have also since said day sublet a portion of said premises to A. C. Richards, a justice of the peace, and he is now in possession. I am informed by counsel learned in the law, and I respectfully submit, that the action of Wood and Blumenberg as aforesaid, was unjustifiable, and manifests a gross contempt for the dignity, decree, and orders of this honorable court.

And further affiant saith not.

RICHARD L. WALLACH.

Subscribed and sworn to before me, this 26 day of March, 1880.

R. J. MEIGS, *Clerk S. C. D. C.*
By R. J. MEIGS, JR., *Ass't Clerk.*

457 *Bill of Mrs. Wallach. Filed Apr. 29, '80.*

In the Supreme Court of the District of Columbia, the 28th day of April, A. D. 1880.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

The further report of A. Thomas Bradley and Thomas Jesup Miller, trustees, to the justice of the supreme court D. C., holding a special term, respectfully shews:

That they have received the annexed offer of purchase of the real estate mentioned in these causes from Mrs. Wallach, one of the parties to the same.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

458 SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

To A. THOMAS BRADLEY & THOMAS JESUP MILLER, *Trustees.*

GENTLEMEN: I hereby offer to purchase the property clear of all incumbrances and free from the claims of all the persons, which you are directed to sell in the above-entitled causes, consolidated, for the sum of thirteen thousand and five hundred dollars ($13,500), on terms as follows: The sum of $6,007.33, my share of the purchase-money at this date, to be first deducted, and for the balance my notes at one, two, and three years, with interest, secured by deed of trust upon the property.

SUSAN L. WALLACH.

That the price named therein is a fair one under the circumstances, but as the terms of the offer are not in accordance
459 with the terms of sale, as prescribed by the decree, they submit it to this court for such action as it may deem proper.

A. THOS. BRADLEY,
TH. JESUP MILLER,
Trustees.

The court declines to approve the offer reported by the trustees.

A. B. HAGNER,
May 26, 1880. *Asso. Justice.*

460 *Order to Show Cause. Filed May 6, '80.*

In the Supreme Court of the District of Columbia, the 6th day of May, A. D. 1880.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

Upon hearing the motion of the parties filed on the 25th day of March, A. D. 1880, and the affidavit of Richard L. Wallach and other proceedings hereinbefore had, it is, this 6th day of May, A. D. 1880, ordered that William P. Wood and Israel R. Blumenberg

show cause on or before the 12th day of May, A. D. 1880, why they and each of them should not be punished for a contempt, provided a copy of this order is served upon them forthwith.

By the court: D. K. CARTTER, *Ch'f Justice.*

461 *Affidavit of S. L. Wallach. Filed May* 12, '80.

In the Supreme Court of the District of Columbia, the —— day of ——, A. D. 1880.

CATHARINE BURCHE *vs.* SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and Consolidated.

SUSAN L. WALLACH *vs.* CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

I, Susan L. Wallach, make oath and state that I am one of the parties to the above entitled causes; that I never at any time or in any manner authorized or empowered Albert F. Fox as agent or attorney for me for any purpose whatever, and more especially I never authorized or empowered as agent or attorney to lease for me or in my name the real estate mentioned and described in the above entitled cause to any person whomsoever, and more especially to one William P. Wood or Israel R. Blumenberg, jointly or separately.

That said William P. Wood and Israel R. Blumenberg be-
462 ing in the possession of said real estate under a certain pretended lease for the term of three years from the 5th day of July, A. D. 1879, which they claim was made to them by said Albert F. Fox, have sub-let portions of the same, upon one of which portions a frame structure is being now erected by some person or persons to me unknown. That the acts and doings of said William P. Wood and Israel R. Blumenberg are in fraud of my rights, being calculated and intended to embarrass the sale of said real estate, ordered by this court on the 3d day of January, A. D. 1880, and to prevent its being sold at its full value.

Wherefore I do respectfully petition this honorable court to pass such further order and decree in the above entitled causes as may be necessary to defeat the fraud so attempted to be perpetrated on my rights, and to secure a fair sale of said real estate.

SUSAN L. WALLACH.

Subscribed & sworn to before me, May 12, 1880.

R. J. MEIGS, *Clerk.*

By M. A. CLANCY, *Ass't Clerk*

463 *Affidavit of A. F. Fox. Filed May* 12, '80.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

ALBERT F. FOX, being duly sworn, deposeth and saith that he never was, nor did he ever state to any one, that he was the agent of Mrs. S. Lavinia Wallach, and that he never undertook to rent or lease the premises in controversy in the above causes as the agent of Mrs. Wallach.

That he did act as the agent of Mrs. Rebecca R. Mellen and Mrs. Catharine Burche, and he did rent the property to Israel Blumenberg and William P. Wood; but this affiant saith that at the time of the said renting to the said parties, he expressly told them, and it was so understood by them, that he had no authority to
464 rent or lease the said property for any definite length of time, and that as the property was in litigation he could only rent subject to the future action of the court. That the said Blumenberg and the said Wood so understood the matter, and they took the property with the express understanding that they were to vacate the same, and deliver it up in good order whenever the same should be decreed to be sold by the court.

This affiant further states that he had no authority from any person whatsoever to rent or lease the said property and premises on any other conditions.

A. F. FOX.

Sworn to and subscribed before me, 12th May, 1830.
R. J. MEIGS, *Clerk.*
By R. J. MEIGS, JR., *Ass't Clerk.*

465 *Motion for Order Modifying Decree. Filed May* 17, '80.

In the Supreme Court of the District of Columbia, the 17th day of May, A. D. 1880.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and Consolidated.

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

Comes Susan L. Wallach, a party to the above entitled causes, by her solicitor, and moves the court hereupon the facts recited in the report of the trustees appointed by this court by its decrees passed

in the above entitled causes on the 3d day of January, 1880, that was filed the 24th day of February, A. D. 1880, in the affidavits of Richard L. Wallach, Susan L. Wallach, Albert F. Fox, respectively, that were filed respectively the 25th day of March, 1880, and the 12th day of May, 1880; and in the answer of William P. Wood and Israel R. Blumenberg, filed this 17th day of May, 1880, in response to the rule of this court issued against them the 6th
466 day *day* of May, 1880, all which papers were filed in the above entitled causes, and are now here to be received and considered herewith as if the facts therein recited were herein specifically set forth as part hereof, and as if said papers were filed contemporaneously herewith in support hereof; to order in furtherance of said decree of January 3d, 1880, and of the order of this court of the 26th day of February, A. D. 1880, and in modification thereof, that the trustees appointed by this court by its decree passed in this above-entitled causes the 3d day of January, A. D. 1880, to make sale of the premises therein mentioned, do proceed to negotiate and of report to this court a sale of the same, without respect to the lease of said premises for the term of three years, which was made by said Albert F. Fox on the 5th day of July, A. D. 1879, to said William P. Wood and Israel R. Blumenberg, as is set forth in said trustees' report, the affidavits of said Richard L. Wallach, Susan L. Wallach, and Albert F. Fox, and in the answer of said Wood and Blumenberg, or any claim of right to the possession of said
467 premises thereunder by said Wood and Blumenberg, or either of them; and further, upon confirmation of such sale by this court, the purchaser of the premises at such confirmed sale shall be forthwith placed in possession of said premises without respect to the said lease or any claim of right to the possession of said premises under it by said Wood and Blumenberg, or either of them, or any one claiming by, through, or under them, or either of them, in respect to said lease; and that said Wood and Blumenberg, and each and every one claiming by, through, or under them, under and by virtue of said lease, concur in said sale and refrain from interfering adversely in any manner to the making of such sale by said trustees, either by publication of notice of said lease or claim of right to possession of said premises under it or otherwise.

LUTHER H. PIKE,
Sol. for Susan L. Wallach.

468 *Return of Wm. P. Wood & Israel R. Blumenberg to Rule. Filed May* 17, '80.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE *vs* SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH *vs.* CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

Answer of Wm. P. Wood and Israel R. Blumenberg to the rule awarded against them in these causes on the 6th day of May, 1880, to show cause why they should not be punished as for contempt of the court.

Respondents, for answer to said rule, say that they deny that they have done or said anything in the premises in contempt of this honorable court.

They admit the posting of the written notice mentioned in the affidavit of Richard L. Wallach, a copy of which is filed with the answer of respondent Wood, to a former rule issued against him herein, and the same is hereby referred to as part of this return. (See pp. 449.)

469 And respondent Wood says that he admits that he verbally called attention to the terms of said notice, and nothing more, at the time the property was offered for sale. And this was done after consultation with counsel, and for the sole purpose of giving notice of said lease to such persons as might become purchasers of the property at said sale, in order to save the rights of respondents, if any, under said lease.

It is not true, as stated in the affidavit of said Wallach, that respondents have no valid lease of said premises, as they are informed and believe. On the contrary, they say they are advised and believe that they have a valid lease for said premises, and are entitled to the possession of the same thereunder for the residue of the term of three years mentioned therein. A copy of said lease is filed with the answer of the respondent Wm. P. Wood to a former rule against him herein, and the same is hereby referred to as part of this answer. (See pp. —.)

And respondents pray to be allowed to produce and read
470 the original in connection with and as a part of this answer.

Respondents further say that the said Fox, who made said lease, was and is the agent of Catharine Burche, who, as they are informed and believe, is the owner of said premises, subject to a certain deed of trust in favor of one —— ———, and that said Fox is also her agent for the purpose of renting and leasing said premises. And they are informed and believe that said Catharine Burche was, at the time of the making of said lease, entitled to the possession of said premises; and the respondents say and answer

upon their own knowledge that she authorized the said Fox to make the said lease to them before the same was made for the term therein mentioned, and they say that there was no contract, agreement, or understanding with the said Fox, or the said Burche, that they should surrender possession of said premises when and if the same should be sold under a decree of the court, or that they should surrender possession otherwise than as provided in
471 said lease itself.

Respondents for further answer say that upon information and belief that they deny that the notice given by them at the sale hindered or prevented the sale, or had any tendency to do so. The trustees at said sale gave a counter notice that they claimed that the lease was null and void, and that the purchaser would be entitled to immediate possession, and the fact of the controversy over the lease did not seem to have any effect upon bidders, and respondents do not believe that it did. And upon their own knowledge they say that it was not intended by them to have any such effect, or in any way to impede or hinder the sale, but only to put them in the position of claiming, as against a purchaser at such sale, possession of the premises, if under the terms of said lease they were entitled to it. Their only object was to give notice of the existence of said lease and their claim under it.

They further say that the lease made by Fox was submitted to and ratified by the said Catharine Burche, and there were
472 no conditions otherwise than expressed on the face thereof.

And they say that the said Fox did not notify them that their tenure would cease upon a decree for the sale of the property.

It is not true, as stated in the affidavit of said Richard Wallach, that these respondents are acting on behalf of some persons unknown to said Wallach. They say that they are acting for no one but themselves, and only for the protection of what rights they may legally have under said lease. Nor do they believe that any person was prevented from bidding upon or purchasing said property by the notice aforesaid.

It is true that since the property was offered for sale these respondents have put in a door where there was formerly a window in said house, but this was done with the knowledge and consent of Mrs. Burche, the owner of said property.

It is also true that they have rented a portion of said building to A. C. Richards, and they claim the right to do so under their said lease. And it is also true that a frame structure is now being erected upon one portion of said premises.

473 But they deny that any or all of said acts are in any way a damage to said premises, but a great advantage and a permanent improvement thereto. And respondents say that since they have been in possession of said premises, improvements and repairs have been placed thereon to the value of not less than five hundred dollars without expense to the owner.

And respondents for further answer again say that none of said acts on their part were done or intended to hinder or impede in any way

the sale of the property, or done or intended in contempt of the authority of the court or any officer or process thereof.

And having fully answered, they pray that said rule may be discharged.

WM. P. WOOD,
ISRAEL R. BLUMENBERG.

DISTRICT OF COLUMBIA, *Washington County,* } *To wit:*

William P. Wood, being duly sworn, says upon oath that
474 he has heard the foregoing answer read and knows its contents, and the facts therein set forth so far as stated upon his own knowledge are true, and those therein stated upon information and belief they believe to be true.

WM. P. WOOD,
ISRAEL R. BLUMENBERG.

Subscribed and sworn to, this 14th day of May, 1880.

R. J. MEIGS, *Clerk.*
By M. A. CLANCEY, *Ass't Clerk.*

Subscribed and sworn to by Israel R. Blumenberg, before me, this 17th day of May, A. D. 1880.

A. C. RICHARDS, *J. P.* [SEAL.]

475 *Order Disch'g Rules against Wood & Blumenberg. Filed May* 19, '80.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE *vs.* SUSAN L. WALLACH *et al.*, } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH *vs.* CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

This cause coming on to be heard upon the rule awarded against Wm. P. Wood, on the 26th day of February, 1880, to show cause why he should not be proceeded against for contempt of court, and the rule awarded against said Wm. P. Wood and Israel R. Blumenberg, on the 6th day of May, 1880, to show cause why they should not be punished for contempt of court, and upon the motion of Susan L. Wallach, filed on the 17th day of May, 1880, to modify the decree of sale heretofore made in this cause, and being argued by counsel and considered by the court, it is, this 19th day of May, 1880, ordered, adjudged, and decreed that the said rules be, and they are hereby, discharged, and that the said motion be, and the same is hereby, denied.

A. B. HAGNER,
Asso. Justice.

476 *Further Report of Trustee's Sale of Lot. Filed June* 14, '80.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE, *vs.* SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH, *vs.* CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

To the honorable the justices of the supreme court of the District of Columbia, holding a special term.

The further report of A. Thomas Bradley and T. Jesup Miller, trustees appointed to make sale of the real estate mentioned in the above mentioned causes, consolidated, respectfully shows, that since the filing of their first report they advertised the said real estate for sale at public auction on Wednesday, the 9th day of June, A. D. 1880, and they annex hereto a copy of said advertisement.

Advertisement of Sale.

Duncanson Bros., auctioneers.

477 Trustees' sale of valuable property, corner of Sixth and D streets northwest, with the buildings thereon.

By virtue of a decree passed in the causes No. 3571 and No. 4423, equity, in the supreme court of the District of Columbia, we will sell on Wednesday, June 9th, A. D. 1880, at 5 o'clock p. m., in front of the premises, all that certain parcel of land situate in the District of Columbia, and known as those parts of lots Nos. 1 and 2, in square No. 457, which are contained in the following metes and bounds: Beginning for the same at the northwest corner of 6th and D streets northwest, running thence north fifty-four $\frac{1}{1}\frac{1}{2}$ feet; thence west one hundred and sixteen $\frac{9}{1}\frac{}{2}$ feet; thence south to D street fifty-four $\frac{1}{1}\frac{1}{2}$ feet; thence east with D street one hundred and sixteen $\frac{9}{1}\frac{}{2}$ feet to the place of beginning, together with the appurtenances.

Terms: One-fourth of the purchase money in cash, of which $500 will be required to be deposited by the purchaser at the time of sale; balance at six, twelve, eighteen, and twenty-four months, or all in cash, at purchaser's option. The deferred payments, if any, to bear interest from the day of sale, and to be secured by
478 a lien upon the property sold.

The sale is peremptory.

A. THOMAS BRADLEY, 452 D St., N. W.,
TH. JESUP MILLER, 501 D St., N. W.,
Trustees.

That at the time and place appointed they attended with the auctioneer, and found posted on the premises certain "notices,"

signed by Wm. P. Wood and I. R. Blumenberg, one of which is hereto annexed.

Notice.

Notice is hereby given that the undersigned have a lease of property known as 402 Sixth street, northwest, in the city of Washington, for *three years* from the 5th day of July, 1879, and will claim possession thereof under the terms of said lease against any and all persons whomsoever, including any purchaser thereof under decree of the court in the case of Wallach *vs.* Burche *et al.* and Burche *vs.* Wallach *et al.*

WM. P. WOOD.
I. R. BLUMENBERG.

479 A fair company being present they instructed the auctioneer to put up the property for sale, when Mr. William P. Wood interrupted the auctioneer and read a notice, which is believed to be a copy of this one herewith filed, to which Messrs. L. G. Hine, of counsel, immediately, and Mr. L. H. Pike, also of counsel for some of the parties, soon after, replied that the lease referred to was of no effect, and that the purchaser would be put into possession within 60 days after the ratification of the sale.

Nevertheless these trustees believe that the notices of said Wood did prevent competitive bidding, and did prevent, and always will prevent a fair price being obtained for said property, unless he and his co-tenant be ejected therefrom.

The property was then offered for sale, and, although among the company there were men of ample means, the bidding was slow; Rebecca R. Mellen became the purchaser thereof at and for the sum of nine thousand nine hundred dollars, and she has complied with the terms of sale in so far as by paying the sum of five hun-
480 dred dollars ($500), the amount of the cash deposit required by the terms of sale, and is ready to fully comply with the terms of sale as may be required by the court. The trustees further report that the above sale was *bona fide* and fairly conducted.

TH. JESUP MILLER,
A. TH'S BRADLEY,
Trustees.

Subscribed and sworn before me, June 14, 1880.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR., *Ass't Clerk.*

Further Report of Trustees. Filed Jun. 15, '80.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.*,
and
SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.*

The undersigned, trustees in the above-entitled causes, further report that since the last sale & report made by them they
481 have received from Mrs. Susan L. Wallach an offer of $13,500 for the land and premises decreed to be sold, upon certain terms and conditions, which will particularly appear by this writing, signed Susan L. Wallach, and herewith made Exhibit S. L. W. and part of this report.

Exhibit S. L. W.

To A. THOMAS BRADLEY and TH. JESUP MILLER, trustees appointed in causes in the sup. ct. D. C., Nos. 3571 and 4423, equity docket, to sell certain real estate in said causes described.

GENTLEMEN: I am advised that I have the right and title to the first of the proceeds of the sale of the property, and therefore offer for the property the sum of thirteen thousand and five hundred — ($13,500) for all the title to the property which you are authorized to sell, clear of any incumbrance by reason of taxes, on terms as follows: The amount due to me as fixed by the decree under which you advertised to sell to be first deducted, the balance to be paid by me in four equal instalments, at six, twelve, eighteen,
482 and twenty-four months after the ratification of the sale, with interest at six per cent. per annum.

SUSAN L. WALLACH.

CITY OF WASHINGTON, *June* 14, 1880.

The undersigned, trustees, not deeming that they have power to act in the premises, respectfully report the fact to the court for instructions.

A. THOS. BRADLEY,
TH. JESUP MILLER,
Trustees.

Order Nisi Ratifying Sale. Filed Jun. 18, '80.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

Ordered that the sale made and reported by the trustees in this cause June 15, 1880, be ratified and confirmed, unless cause
483 to the contrary thereof be shown on or before July 17th, 1880, provided a copy of this order be published in the Washington Law Reporter once in each of three successive weeks before that day. The report states amount of sale to be $9,900.

By the court: MACARTHUR, *Justice.*

Proof of Publication. Filed Jul. 15, '80.

UNITED STATES OF AMERICA,
District of Columbia. } *ss:*

On this fifth day of July, A. D. 1880, personally appeared before me, the undersigned, a notary public in and for the district aforesaid, John L. Ginck, being personally well known to me, and made oath in due form of law to the following statement, viz: That affiant is one of the publishers of the "Washington Law Reporter," a newspaper published in the city of Washington, D. C.; that the annexed notice was published in said "Washington Law Reporter" once a week for three successive weeks, as follows: June 21, June 28, July 5, 1880.

JOHN L. GINCK.

Sworn and subscribed before me, the day and year above written.
[SEAL.] LEMUEL BURSLEY,
Notary Public.

484 *S. L. Wallach's Exceptions to Report of Trustees. Filed July* 1, '80.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

Now comes Susan L. Wallach, a party to this cause, and excepts

to the report of Th. Jesup Miller and A. Thomas Bradley, trustees, filed in the above entitled cause on the 14th day of June, 1880, and for ground of exception shews—

1. That said trustees did not report that the sale was a fair one.

2. That the said trustees reported a state of facts which demonstrates that the sale was not a fair one in fact, and that competition was prevented at said sale among bidders by the advertisement and proclamation of Wm. P. Wood and I. R. Blumenberg, a
485 copy of whose advertisement was returned with the said trustee's report, and herewith is filed further the affidavit of Richard L. Wallach, who attended the sale, that such interference did prevent competitive bidding at said sale.

Affidavit of Rich'd L. Wallach.

Richard L. Wallach, being duly sworn, deposes and says: That he was present on the fourteenth day of June, A. D. 1880, when A. Thomas Bradley and Thomas Jesup Miller, attempted to make sale of the property known as the Hewitt property, at the corner of 6th & D streets, N. W.; that he saw the notices of Wood and Blumenberg, and heard the proclamation by Wood, and also the replies of Messrs. Pike & Hine; that a third reply to the lawyers was made by some person in the crowd to this affiant unknown, "that there are too many lawyers in the matter"; that the bidding at the sale was utterly dull, no one bidding except Mr. Hine, in behalf of Mrs. Mellen, and one other person.

That this affiant verily believes that the notices of said Wood
486 and his announcement at said sale prevented competitive bidding, and led people in the crowd to believe that the purchaser at such sale would "buy a law suit"; that the price bid for the property is grossly inadequate; that the very same person, Mrs. Mellen, by her agent, in January last, bid for the same property the sum of $11,000, which bid the trustees then refused as inadequate; this affiant says that he, this affiant, would, and he thinks every sinsible or prudent person would, be prevented from bidding for property at any such sale. This affiant further believes that no fair sale can be made of the property without first ejecting therefrom the said Wood & Blumenberg.

RICHARD L. WALLACH.

Sworn & subscribed to before me, this 29th day of June, A. D. 1880.

R. J. MEIGS, *Clerk.*
By M. A. CLANCY, *Ass't Clerk.*

3. The bid reported was grossly inadequate, to wit: $9,900. This abundantly appears from the proceedings in this cause.

Mrs. Mellen, the bidder, is a party to the cause, Wood &
487 Blumenberg, whose notice and proclamation at the time of the sale prevented competition, claim to hold a lease-hold interest in the said premises by virtue of a lease from the agent of the

said Mellen, as one of their lessors. And further there was an offer, when the said trustees attempted to sell said property on the 20th of January, 1880, of $11,000 for this property; that said bid of $11,000 was made on behalf of said Rebecca Mellen, whose bid now reported is $9,900.

4. The said trustees have filed a subsequent report to that of June 14, 1880, to wit: on the 15th day of June, 1880, reporting an offer of $13,500, made by Susan L. Wallach, who files these exceptions to the trustees' report of 14th June, 1880.

5. That the property is assessed on the tax-books of the city as of the value of $14,750, and the trustees recently refused any other bid than $14,500, and so reported to this court.

6. That the trustees do not report any compliance with the
488 terms of sale by said attempted purchaser.

This party now excepting is entitled to be paid in the first place her share of the purchase money at the former sale on the 8th day of December, 1873, amounting to the sum of $3,975.44, with interest at 8 per cent. (as appears from the auditor's report duly confirmed) from the day of such sale, at which sale the said Catharine Burche was the purchaser, with the connivance of said Rebecca R. Mellen, and has since had possession of the property, and paid no part of the purchase money, and left all accruing taxes unpaid; that the party now excepting is entitled to have the purchase money to be paid to her paid to the said trustees.

For these and other reasons the sale reported to have been made to Mrs. Mellen should not be confirmed.

L. H. PIKE,
Of Counsel for Mrs. Wallach.

489 *Order Sustaining Exceptions & Resale Ordered. Filed Nov.* 8, '80.

In the Supreme Court of the District of Columbia, November 8th, 1880.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.*
} No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.*
} No. 4423. Eq. Doc. 15.

These causes (consolidated) came on to be heard at this term upon the trustees' report of sale (of the premises described in the bill and proceedings in these causes), filed herein June 14, 1880, and Mrs. Wallach's exceptions thereto, and was argued by counsel and submitted, and it appearing to the satisfaction of the court that the action of William P. Wood and Israel R. Blumenberg, as narrated in the report of sale, injuriously affected the same, it is therefore, this 8th day of November, 1880, adjudged and ordered that said exceptions be, and they are hereby, sustained for the reasons afore-

said, and the said sale vacated and set aside, with directions
490 to the trustees to return to the bidder, Mrs. Rebecca R. Mellen, or her solicitor, the five hundred dollars (reported by them as) deposited by her in compliance with the terms of said sale.

It is further ordered that said trustees do forthwith give notice and proceed to sell said property within two weeks from this day; and further that said Wood and Blumenberg, appearing by their answers to the rules issued against them in these causes, to show cause why they should not be attached as for a contempt of court in interfering with the trustees in effecting a sale of said property, to have acquired whatever interest they, or each of them, may have in the property *pendente lite*, they are hereby restrained and enjoined from obstructing the trustees in selling said property, or from making any announcement or publishing any notice at the time and place of the sale, to be hereafter made, in respect to any interest they, or either of them, claim in the lots of ground and improvements decreed to be sold, under pain of attachment and such other punishment for contempt as the court may impose, with lib-
491 erty, however, to them after the sale to intervene by petition, as they may be advised, touching any interest or claim they may have in said property.

By the court: W. S. COX, *Justice.*

Petition of Wm. P. Wood & J. Blumenberg. Filed Nov. 18, '80.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4443. Eq. Doc. 15.

To the supreme court of the District of Columbia:

Your petitioners, William P. Wood and Israel Blumenberg, respectfully show that heretofore rules were issued in the above causes against them and served on them to show cause why they should not be proceeded against for contempt of court in notifying
492 the bidders at a sale of the property mentioned in said cause that your petitioners hold a lease of said real estate.

Your petitioners filed their answer to said rules, and after a full argument by counsel for the several parties to said cause and counsel for petitioners, the court held that your petitioners had the right to protect any rights they may have by giving such notice, and were not liable to be proceeded against as for contempt, and discharged said rules by a decretal order entered in said causes on the 19th day of May, 1880.

Your petitioners further show that on the 8th day of November, 1880, said causes came on to be again heard upon a motion of some

of the parties in *set* causes to set aside the sale theretofore made and direct a re-sale of the property. That no further rule or notice has ever been issued or served on your petitioners in said causes, and they had no notice of the hearing of said motion, and were not interested therein. But that the court in pronouncing a de-
493 cree in said causes, on the 8th day of November, 1880, setting aside said sale, pronounced judgment or decree against your petitioners on said rule, enjoining them from giving any notice of the rights claimed by them at any future sale to be made of said property under pain of attachment for contempt or any such other punishment as the court may see fit to inflict.

The fact of the entry of said decree did not come to the knowledge of your petitioners until to-day.

Your petitioners further show that they have a lease for a term of three years from August, 1879, for the premises mentioned in these causes, from all the parties to said suit, or their agents, who claim or have any title thereto as adjudicated by the court, and they are advised that they have the right to notify the purchaser at said sale of the existence of their lease as the same is not recorded.

Your petitioners further show that the trustees have advertised said property for sale on the 19th instant at 3.30 o'clock p. m.
494 They therefore pray that the said decree entered in said cause on the 8th day of November, 1880, or so much thereof as adjudges them in contempt, and enjoins them from giving notice of their lease at said sale, may be set aside, and that said trustees may be directed to suspend said sale, until the matters arising on this petition can be heard, and as in duty bound will ever pray, &c., &c.

WM. P. WOOD.

DISTRICT OF COLUMBIA, *Washington County*, } *To wit:*

William P. Wood, being duly sworn says, upon oath, that he has read the foregoinn petition and knows its contents, and that the matters therein set forth on his own knowledge are true, and those therein set forth upon information and belief he believes to be true.

WM. P. WOOD.

Subscribed and sworn to before me, this 18th day of November, 1880.

[SEAL.] MARION DORIAN,
Notary Public.

495 You are hereby notified that the foregoing petition has this day been filed in the above-styled causes, and that we will call the same up for the action of the court at its meeting on the 19th day of November, 1880, or as soon thereafter as counsel can be heard.

COOK AND COLE,
For WOOD & BLUMENBERG.

T. JESSUP MILLER.

Trustees' Report. Filed Nov. 22, '80.

In the Supreme Court of the District of Columbia, the — day of November, 1880.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

To the honorable the justices of the supreme court of the District of Columbia, holding a special term:

496 The further report of A. Thomas Bradley and Thomas Jesup Miller, heretofore appointed trustees to make sale of the land and premises mentioned and described in the above-entitled causes, consolidated, respectfully shows unto your honor:

That in obedience to the order passed in these causes on the 8th day of November, A. D. 1880, they caused to be advertised for sale, on Friday, the 19th day of November, A. D. 1880, the land and premises hereinbefore referred to, which advertisement was published in the "Evening Star," a newspaper printed and published in the city of Washington, and copy of the same is hereto annexed:

Advertisement.

Duncanson Bro's, Auctioneers.

Trustees sale of valuable property, corner of Sixth and D streets, northwest, with the buildings thereon.

By virtue of a decree passed in the causes No. 3571 and No. 4423, equity, in the supreme court of the District of Columbia, and also by an order passed by the same court November 8th, A. D.
497 1880, we will sell on Friday, the 19th day of November, A. D. 1880, at 3.30 o'clock p. m., in front of the premises, all that certain parcel of land situate in the District of Columbia, and known as those parts of lots Nos. 1 and 2, in square No. 457, which are contained in the following metes and bounds: Beginning for the same at the northwest corner of 6th and D streets, northwest, running thence north fifty-four *feet* $\frac{11}{12}$ feet, thence west one hundred and sixteen $\frac{2}{12}$ feet; thence south to D street fifty-four $\frac{11}{12}$ feet; thence east with D street one hundred and sixteeen $\frac{2}{12}$ feet to the place of beginning, together with the appurtenances.

Terms: One fourth of the purchase money in cash, of which $500 will be required to be deposited by the purchaser at the time of sale, balance at six, twelve, eighteen, and twenty-four months, or all in cash, at purchaser's option. The deferred payments, if any,

to bear interest from the day of sale, and to be secured by a lien upon the property sold.

The sale is peremptory.

A. THOMAS BRADLEY, 452 D. St., N. W.,
TH. JESUP MILLER, 501 D. St., N. W.,
Trustees.

Nov. 9, d. & ds.

498 That at the time and place named in said advertisement they attended with the auctioneer, and a good company being present, the- offered for sale, at public auction, the said land and premises, and that the same were sold to Rebecca R. Mellen at and for the sum of nine thousand and nine hundred dollars ($9,900), she being the highest bidder therefor; that the said Rebecca R. Mellen has paid the sum of five hundred dollars in cash, as required by the terms of the advertisement, and the undersigned are informed by her solicitor that she elects to pay the whole amount of the purchase money in cash upon the final ratification of her purchase, and that she will pray leave to set off the amount of her claim against said land and premises in the settlement of her said purchase.

The trustees would further report that the said sale was *bona fide* and fairly conducted, and that prior to said sale they paid to the solicitor of the purchaser of the prior sale the sum of five hundred dollars, as directed by the order of the 8th day of November, A. D. 1880.

499 All of which is respectfully submitted.

A. THOS. BRADLEY,
TH. JESUP MILLER,
Trustees.

Subscribed and sworn to before me, this 22d day of November, 1880.

R. J. MEIGS, *Clerk.*
By R. J. MEIGS, JR., *Ass't Clerk.*

Order Nisi Ratifying Sale Filed Nov. 23, '80.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE *vs.* SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH *vs.* CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

Ordered by the court, this 23d day of November, A D. 1880, that the sale made by A. Thomas Bradley and Thomas Jesup Miller, trustees, of the real estate mentioned in the above-entitled causes, consolidated, and reported to this court on the 22d day of
500 November, A. D. 1880, be ratified and confirmed, unless cause to the contrary thereof be shown on or before the 25th

day of December, A. D. 1880: provided a copy of this order be inserted in the "Law Reporter" once in each of three successive weeks before the 25th day of December next.

The report states the amount of sale to be $9,900.

W. S. COX, *J.*

Proof of Publication. Filed Dec. 27, '80.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

On this 21st day of December, A. D. 1880, personally appeared before me, the undersigned, a U. S. Commissioner in and for the District aforesaid, John L. Ginck, being personally well known to me, and made oath in due form of law to the following statement, viz: That affiant is one of the publishers of the "Washington Law Reporter," a newpaper published in the city of Washington, D. C.; that the annexed notice was published in said "Washington Law Reporter" once a week for three successive weeks, as follows: Dec. 6, 13th, & 20th, 1880.

JOHN L. GINCK.

Sworn and subscribed before me, the day and year above written.

[SEAL.] LUCIAN O'BRIEN,
United States Commissioner.

501 *Opinion of Justice Cox. Dec.* 28, '80.

In the Supreme Court of the District of Columbia.

DECEMBER 28TH, 1880.

CATHARINE BURCHE *vs.* SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH *vs.* CATHARINE BURCH *et al.* } No. 4423. Eq. Doc. 15.

As I understand the facts in this case, Mrs. Wallach and Mrs. Burche executed a deed of trust to secure an indebtedness of $5,000 to the defendant, Mrs. Mellen. The deed also provided that any taxes or other liens paid by Mrs. Mellen should be equally secured with the original debt. In case of default the trustee was to sell on such terms as he might deem best for all parties. He was not expected, of course, to sell for cash. No trustee would ordinarily be justified in selling valuable property for cash, which would involve necessarily a sacrifice. When he does sell, it is his duty to apply the cash proceeds and the deferred payments, when
502 collected, to the satistaction of the debt and any accumulated taxes. In point of fact, up to December, 1873, a large

amount of taxes had accumulated. Mrs. Mellen's right, then, was to have this property sold and the proceeds applied, first, to pay off the taxes, and, secondly, to pay the debt.

The trustee advertised upon the terms that $5,000, the amount of her debt, and interest, should be paid in cash, and the rest in two instalments, at one and two years, secured, of course. After the advertisement, as I understand it, Mrs. Mellen agreed with Mrs. Burche that, if the latter should become purchaser at the trustee's sale, she, Mrs. Mellen, would advance the sum necessary to pay the taxes and allow Mrs. Burche to give a new note for the amount of her debt and the taxes at five years, and give separate security for the remaining part of the purchase money. It is charged that this was a collusive arrangement between Mrs. Mellen and Mrs. Burche to oust Mrs. Wallach from any interest in the property. I find no evidence of this in the case. It is certain that Mrs. Mellen interviewed Mrs. Wallach on the subject
503 of purchase by the latter, and Mrs. Wallach seems to have declined it, unless Mrs. Mellen would advance the money necessary to pay Mrs. Burche her share. I am satisfied that Mrs. Mellen was willing to make a similar arrangement to that mentioned with either of the two tenants in common. It seems to me that, so far from seeking to injure either, her proposition looked to the interest and advantage of the mortgageors. Instead of exacting payment according to the terms of sale, which was beyond their means, she was willing to indulge them, or either of them, in order to enable them, or one of them, to acquire and save the property. I am not able to see that this arrangement was in any sense wrong. I do not see why a creditor is not at liberty to arrange beforehand that if his debtor shall become the purchaser at a forced sale, he will make more liberal terms with him than a stranger. Mrs. Mellen had the right, according to the prescribed terms of sale, to have her debt paid in cash, as well as all accrued taxes, Waiving this privilege, she consents that Mrs. Burche, as purchaser, shall have five years
504 within which to pay her debt; and this is just as much a part of the terms of sale as the printed terms.

The only complaint which could be made against that would arise in case Mrs. Wallach's share of the surplus proceeds was thereby postponed as to payment. But such is not the scope of this arrangement. If the trustee had taken a single deed of trust to secure Mrs. Mellen's notes for the debt and taxes, and to secure the surplus, then, if the one and two year notes should not be paid, out of which Mrs. Wallach was to receive her share of the surplus, he would have been compelled to sell the whole property over and apply the proceeds, first, to pay Mrs. Mellen's notes in advance of their maturity, and then divide the surplus. By the arrangement that was made, whereby two separate deeds of trust were taken, one in favor of Mrs. Mellen and the other in favor of Mrs. Wallach for her share of the surplus, in case Mrs. Wallach's notes were not paid, it did not become necessary to sell for the

whole indebtedness, but the property could be sold at the end of one or two years, subject to Mrs. Mellen's prior note.

505 Mrs. Mellen secured no advantage by this arrangement of two deeds, which she would not have had if a single deed had been taken. In either case she is entitled to be first paid her debt and her advances. The time for payment of Mrs. Wallach's share of the surplus was not postponed by this arrangement beyond the time fixed in the printed terms of sale. Even if this arrangement between Mrs. Mellen and Mrs. Burche could be objected to by Mrs. Wallach, what would be her proper remedy?

The most that could be said would be that she would have a right to file her bill to compel payment by Mrs. Buche in compliance with the printed terms of sale, that is to say payment of sufficient cash to satisfy Mrs. Mellen, and then the surplus in the one and two years from the date of sale, but on no ground do I perceive why Mrs. Mellen should lose her priority. If one deed had been taken providing for a note to Mrs. Mellen at five years, and the others at one and two years, some question might possibly have been

506 raised whether Mrs. Mellen had waived her priority by holding the latter note. But she had a right in giving any indulgence to stipulate that her priority should be preserved, and this arrangement of two deeds, of which hers is first recorded, is simply a means of retaining and securing the priority to which she is entitled.

The property now being sold, the only question is, whether in any way she has lost her priority, and I am unable to see that she has in any way done so.

The court in the last decree at special term fixed the amount which constituted the lien on the premises at the time of the sale. It consisted of her debt and interest and the amount advanced by her and actually disbursed in payment of taxes and expenses accrued on the property. This amount, with additional interest since that date upon the principal debt, and upon the advances for taxes and costs, I think she is entitled to be paid first out of the fund. But inasmuch as the whole purchase money falls short of the indebtedness to her, and she is the purchaser, I think she is entitled to discount or set off her claims as against the purchase money due from her, and will decree accordingly.

W. S. COX, *J.*

507 *Decree Final Ratifying Sale, &c. Filed Dec. 29, '80.*

In the Supreme Court of the District of Columbia, Dec. Special Term, 1880.

CATHARINE BURCHE
vs.
S. LAVINIA WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and Consolidated.

S. LAVINIA WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

These causes came on to be finally heard at this term, and were argued by counsel for the respective parties and submitted; upon consideration thereof, it is, this 29th day of December, 1880, adjudged, ordered, and decreed that the sale of the property mentioned and described in the bills and proceedings in these causes to defendant, Rebecca R. Mellen, made and reported by the trustees in these causes November 19, 1880, be and the same is hereby ratified and confirmed, no cause to the contrary thereof appearing, although due notice appears to have been given.

It is hereby further ordered, adjudged, and decreed that
508 Rebecca R. Mellen, purchaser, be, and she is hereby, allowed to discount her claim, namely, seven thousand four hundred and twenty-nine $\frac{02}{100}$ dollars ($7,429 $\frac{02}{100}$), as ascertained and fixed by the decree passed in these causes, January 3, 1880, with interest, hereby allowed on $5,000 thereof from December 8, 1873, and on $2,105.41 thereof (being the aggregate of moneys advanced by said Mellen to pay taxes and expenses of sale in respect to said property, and specified in the report of the auditor, filed herein October 30th, 1879) from December 8th, 1873, and the taxes and assessments which have accrued against the property since December 8, 1873, out of the purchase money. And it appearing that counsel for the respective parties in interest have agreed upon a statement, which has been duly filed, showing the costs and expenses of sale, the taxes and assessments charged against the property since December 8th, 1873, and the distribution of the proceeds of sale in the hands of the trustees, as exhibiting a correct distribution of
509 the fund according to the principles settled by this decree, the usual order of reference to the auditor for a statement of the trustee's account and the distribution of the proceeds is rendered unnecessary. It is further ordered that said trustees do forthwith convey to Rebecca R. Mellen the premises sold, by good and sufficient deed, and that said trustees thereupon be relieved from their said office of trustees, and released from any further responsibility as such trustees.

W. S. COX, *J.*

510 *Agreed Statement of Trustees.* *Filed Dec.* 29, '80.

In the Supreme Court of the District of Columbia.

CATHARINE BURCHE *vs.* SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH *vs.* CATHARINE BURCHE *et al.*. } No. 4423. Eq. Doc. 15.

A. Thomas Bradley and Th. Jessup Miller, trustees, in ac. with equity causes Nos. 3571 and 4423, consolidated.

	Cr.	Dr.
To proceeds of sale parts of lots 1 & 2, square 457, to Mrs. R. R. Mellen, Nov. 22, 1880		9,900 00
By expenses of sale:		
Trustee's commission	334 50	
Advertising original	24 53	
postponement	15 38	
readvertisement	24 10	
" "	24 00	
Law Reporter	5 65	
"	9 00	
"	2 95	
Auctioneer's charges	34 00	
511		474 11
D. C. taxes yr. ending 30 June, 1881	210 42	
" " " 1880	253 00	
" " " 1879	266 90	
" " " 1878	274 96	
" " " 1877	288 82	
" " " 1876	305 32	
" " " 1875	687 12	
Assessment for 6th street pavement	136 71	
Int. on above, at 6 per cent. from July 15, '75	45 10	
		2,467 09
Costs of suits	135 60	
		135 60
Mrs. Mellen, creditor, allowed to discount her claim out of balance of proceeds of sale	7,429 02	
Int. at 6 per cent. on $500.00 thereof from Dec. 8, 1873	2,100 00	
Int. $2,105.41 thereof, at 6 per cent., from Dec. 8, 1873	884 10	
		10,413 12
Deficiency		$3,580 81

It is agreed that the above is a full and correct statement of the trustee's account in these cases, and of the distribution of
512 the fund in their hands, and that the same may be filed in the cause in lieu of an auditor's report on the subject.

L. G. HINE,
S. T. THOMAS,
For Mrs. Mellen.
JESUP MILLER,
LUTHER H. PIKE,
For Mrs. Wallach.

513 *Voucher No. 1.*

Received, Washington, Dec. 29, 1880, of Rebecca R. Mellen, three hundred and thirty-four $\frac{50}{100}$ dollars, the same being the amount of commission due us on the sale in the cases of Burche *vs.* Wallach and Wallach *vs.* Burche, (consolidated,) and we have this day paid all the costs and charges attending said sale out of the five hundred dollars heretofore paid us on acct. of said sale by said Mellen, and the balance have paid to L. G. Hine, her solicitor.

_____ _____,
A. THOMAS BRADLEY, *Trustees.*

Voucher No. 2.

WASHINGTON, D. C., 7 *Jan'y*, 1880.

Bradley & Miller to the Evening Star Newspaper Co., Dr.

To advertising in the Evening Star, as follows:

Chan. sale, $7\frac{3}{4}$, 13 ..... $24 53

Received payment for Co.,
Dec. 29, '80. J. WHIT HERRON.

514 *Voucher No. 3.*

WASHINGTON, D. C., 21 *Jan'y* 1880.

Bradley & Miller to the Evening Star Newspaper Co., Dr.

To advertising in the Evening Star, as follows:

Post. chan., $10\frac{1}{4}$, 4 ..... $15 38

Received payment for Co.,
Dec. 29, '80. J. WHIT HERRON.

Voucher No. 4.

WASHINGTON, D. C., *Dec.* 29, 1880.

Bradley & Miller to the Evening Star Newspaper Co., Dr.

To advertising in the Evening Star, as follows:

Chan. sale, $8\frac{1}{2}$, 11 ..... $24 00

Received payment for Co.,
May 28, '80. J. WHIT HERRON.

Voucher No. 5.

WASHINGTON, D. C., *Nov.* 9, 1880.

Bradley & Miller to the Evening Star Newspaper Co., Dr.

To advertising in the Evening Star, as follows:

Chan. sale, 9, 10 ..... $24 00

Received payment for Co.,
Dec. 29, '80. J. WHIT HERRON.

515 *Voucher No. 5½.*

WASHINGTON, D. C., *June* 15, 1880.

Messrs. A. T. Bradley & T. J. Miller, trustees, to Washington Law Reporter, Dr.

To publishing trustees' sale, eq. cause No. 4423 ..... $2 95

Rec'd payment. JOHN L. GINCK & CO.
M. L.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

On this fifteenth day of June, A. D. 1880, personally appeared before me, the undersigned, a notary public, in and for the District aforesaid, John L. Ginck, being personally well known to me, and made oath in due form of law to the following statement, viz: That affiant is one of the publishers of the "Washington Law Reporter," a newspaper published in the city of Washington, D. C.; that the annexed notice was published in said "Washington Law Reporter" once as follows: June 7, 1880.

JOHN L. GINCK.

Sworn and subscribed before me the day and year above written.

[SEAL.] LEMUEL BURSLEY,
Notary Public.

516 *Voucher No. 6.*

WASHINGTON, D. C., *Jan'y 27th*, 1880.

Messrs. A. T. Bradley, T. J. Miller, trustees, to Washington Law Reporter, Dr.

1880, Jan. 12, to pub. trustees' sale, equity No. 3571 ..... $9 00

Received payment. JOHN L. GINCK & CO.
M. L.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

On this 27th day of January, A. D. 1880, personally appeared before me, the undersigned, a notary public in and for the District aforesaid, John L. Ginck, being personally well known to me, and made oath in due form of law to the following statement, viz: That affiant is one of the publishers of the "Washington Law Reporter,"

a newspaper published in the city of Washington, D. C.; that the annexed notice was published in said "Washington Law Reporter" once a week for three successive weeks as follows: 12th, 19th & 26th, 1880.

JOHN L. GINCK.

Sworn and subscribed before me, the day and year above written.
[SEAL.] JAMES T. POWELL,
Notary Public.

517 *Voucher* 6¼.

WASHINGTON, D. C., *Dec.* 21, 1880.

Messrs. A. T. Bradley & T. J. Miller to Washington Law Reporter, Dr.

To publ'g order *nisi*, Burche-Wallach *vs.* Wallach-Burche, eq. 3571 & 4423, $5.65.

Rec'd payment. JOHN L. GINCK & CO.
M. L.

Voucher No. 6½.

WASHINGTON, D. C., *Dec.* 29, 1880.

M———.

Bought at auction of Duncanson Brothers, Auctioneers and Commission Merchants, corner of 9th and D. Sts., N. W.

Received of A. Thomas Bradley & Th. J. Miller, tr's in case No. —, Burche & Wallach & Wallach & Burche, thirty-four dollars, in full for our services in this case.
$34.00. DUNCANSON BROS.
KING.

518 *Voucher No.* 7.

WASHINGTON CITY, FOLIO 107.

Catharine Burche to the District of Columbia, Dr.

For tax on real estate for the year ending June 30, 1881:

Tax, $1.50 per $100 assessed valuation.

Square.	*Lot.*	*Value of Lot.*	*Value of Imps.*	*Total Ass'd Val.*
457	of 1	$5,330	$5,000	
	of 2	4,336	100	
				$14,766

To all of tax ---------- $221 49
" abatement ----------
" penalty 57 per cent ---------- 11 07

$210 42

Received payment. JOHN F. COOK, *Collector.*
W. G.

519 *Voucher No.* 8.

1880. TREASURER AND ASSESSOR'S OFFICE,
DISTRICT OF COLUMBIA, *December* 6, 1880.

Items of sale:

To all of tax for year ending June 30, 1880	$221 49
To penalty	31 01
To advertising, 1880	40
To auctioneer's fee	10
Amount sold for	$253 00

1880 tax book, page 98, of lot 1 of 2, square No. 457:

To amount sold for at sale for taxes, October 1, 1880, assessed in the name of Catharine Burche	$253 00
Interest at the rate of ten per cent. per annum from day of sale to date of redemption	6 33
Amount required to redeem	$259 33

Received payment. JOHN F. COOK, *Collector.*
W. G.

520 *Voucher No.* 9.

WASHINGTON CITY, FOLIO 91.

Catharine Burche to the District of Columbia, Dr.

For tax on real estate for the year ending June 30, 1879:

Tax, $1.50 per $100 assessed valuation:

Square.	*Lot.*	*Value of Lot.*	*Value of Imp's.*	*Total Ass'd Val.*
457	of 1	$53.30	$5,000	
	" 2	43.36	100	
				$14,776.

To all of tax	$221 49
" abatement	
" interest six per cent.	45 41
	$266 90

Received payment. JOHN F. COOK, *Collector.*
E. W. W. G. Dec. 6, '80.

521 *Voucher No.* 10.

WASHINGTON CITY, FOLIO 81.

Catharine Burche to the District of Columbia, Dr.

For tax on real estate for the year ending June 30, 1878:

Total tax, $1.50 per $100 assessed valuation:

Square.	*Lot.*	*Value of Lot.*	*Value of Imp's.*	*Total Ass'd Val.*
457	of 1	$5,765	$5,000	
	of 2	4,853	100	
				$15,718

To all of tax $235 77
To interest, six per cent. 38 90

$274 67

Received payment. JOHN F. COOK, *Collector.*
E. W. W. G. Dec. 6, '80.

522 *Voucher No.* 11.

WASHINGTON CITY, FOLIO 72.

Catharine Burche to the District of Columbia, Dr.

For tax on real estate for the year ending June 30, 1877:
Total tax, $1.50 per $100 assessed valuation:

Square.	*Lot.*	*Value of Lot.*	*Value of Imp's.*	*Total Ass'd Val.*
457	of 1	$5,765	$5,000	
	of 2	4,853	100	
				$5,718

To all of tax $235 77
To penalty .....
Interest at six 53 05

$288 82

Received payment. JOHN F. COOK, *Collector.*
E. W. W. G.

523 *Voucher No.* 12.

WASHINGTON CITY, FOLIO 69.

Catharine Burche to the District of Columbia, Dr.

For tax on real estate for the year ending June 30, 1876:

Tax, $1.50 upon $100 assessed valuation:

Square.	*Lot.*	*Val. of Lot.*	*Val. of Imp's.*	*Total Assessed Val.*	*Am't of Tax.*
457	of 1	$5,765	$5,000		
	of 2	4,853	100		
				$15,718	

To —— of tax $235 77
To int. at 6 per cent 69 55

$305 32

Received payment. JOHN F. COOK, *Collector.*
E. W. W. G. Dec. 6, '80.

524 *Voucher No.* 13.

WASHINGTON CITY, FOLIO 64.

Catharine Burche to the District of Columbia, Dr.

For tax on real estate for the year ending June 30th, 1875:

Total tax, $3.00 per $100 assessed valuation:

Square.	*Lot.*	*Val. of Lot.*	*Val. of Imp's.*	*Total Ass'd Value.*	*Am't of Tax.*
757	of 1	$6,588	$5,000		
	of 2	5,176		$16,764	

Total amount of tax	$502 92
Int. at 6 per annum	184 20
	$687 12

Received payment. JOHN F. COOK, *Collector.*
E. W. W. G. Dec. 6, '80.

525 *Voucher No.* 14.—*O. R.*

Book 4, 1, folio 119, 196.
Revised.

OFFICE OF THE COMMISSIONERS, DISTRICT OF COLUMBIA,
SPECIAL ASSESSMENT DIVISION,
Room No. 6, second floor, Columbia Building, Four-and-a-half street,
WASHINGTON, D. C., *Dec.* 27, 1880.

CATHARINE BURCHE:

You are hereby notified that of lot No. 1, square No. 457, in Washington, D. C., has been assessed for special improvements, said lot fronting 54 11/12 feet on 6th street, La. ave. to G st. n. w.

		Rate per front foot. Dollars.	Cents.	Dollars.	Cents.
Grading		--	--	82	86
Curbing		--	--	51	96
Footway		--	--	39	23
Carriageway		--	--	160	77
Parking		--	--	13	18
Steps, &c		--	--	72	30
				420	24
526 By drawback for old material		99	14		
" " add'l ac. grading		27	30		
" " " steps, &c		72	30		
" ac. D street front		84	79		
				283	53
				136	71
Interest, 6 per cent. from July 15, 1875, to Dec. 30, '80				41	36
				178	07

Received payment of Peter Campbell.
J. W. C., Dec. 30, '80. JOHN L. COOK, *Collector.*

527 *Appeal to General Term Filed Dec.* 31, '80.

In the Supreme Court of the District of Columbia, December 31, 1880.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

The clerk will note the appeal of Mrs. Susan L. Wallach to the general term from the decree of special term entered in these cases, consolidated.

LUTHER H. PIKE,
Sol'r for Mrs. Wallach.

Appeal, as ordered, entered Dec. 31, 1880.

By the Clerk.

528 *Justice M-cArthur. Filed July* 8, '81.

Supreme Court of the District of Columbia. In General Term, April, 1881.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

Opinion of the court in the above cases, delivered by Mr. Justice M-cArthur, orally.

Mrs. Burche and Mrs. Wallach are sisters, and acquire title to the property in controversy through the will of their father, who died many years ago, leaving a wife, to whom he devised a life estate in the property. She also died in the fall of 1872, leaving these two ladies with an absolute title in fee simple.

On the 15th day of January, 1872, these two sisters borrowed $5,000 from Mrs. Rebecca R. Mellen, and they both joined in executing a promissory note to her for that amount, and a deed of trust upon the property to secure its payment.

529 The note was payable in five years, with interest at the rate of 10 per cent. per annum, payable semi-annually; and the condition of the deed was, that upon default being made in the payment of interest or any part of the principal, the property might be sold by the trustee, who was J. C. G. Kennedy, upon an advertisement of ten days, and the whole amount of the indebtedness

should the —— become due. Default having been made in the payment of interest, Mrs. Mellen directed the trustee to advertise the premises for sale. Mr. Kennedy thereupon advertised the property for sale, and on the 8th of December, 1873, sold it at public auction, the same being struck off to Mrs. Burche, she being the highest bidder, for $16,509.66. This would leave a large balance after satisfying the indebtedness and interest, and the other liens then existing upon the property in the shape of taxes.

Some of the doctrines applicable to trust deeds have been so well established that they may be considered elementary. The
530 trust deed is assimilated to a mortgage in many respects, and the notice advertising the property for sale is analogous to a decree in foreclosure. The effect of a sale in either case and the execution of a deed to the purchaser is to convey all the right, title, and interest of the grantors in the property to the purchaser, and to cut off their right of redemption forever. They are alike, also, in the consequences of such sale, that the proceeds are to be applied to the satisfaction of the indebtedness, and, if a balance remain, it is to be distributed to the grantors in the trust deed according to their interest in the property.

The equity of redemption existing in the owners is converted by such sale and represented by the balance of the purchase money, after satisfying the security, and the sale becomes a satisfaction of such debt to the amount of the proceeds realized. A distribution to the grantors only takes place in case of there being a surplus. Had there been a judicial foreclosure in this case, (and it is much to be regaetted now that that course was not pursued,) the
531 court would have applied the proceeds, as I have already indicated, to the full satisfaction of the beneficiary, and afterwards to the grantors in the deed, according to the amount of *of* their respective shares in the balance.

This rule would apply also to a sale after advertisement without judicial process, unless a different course had been agreed upon by all the parties interested, and should a sale take place for any other purpose than that which I have mentioned, the court would interpose for the purpose of preventing any deviation from the contract, or from the advertised terms of sale.

The trust deed in this case has the following clause, and I believe such a clause is found in all similar instruments. It provides:

"Upon any and every such default or failure being made in the payment as aforesaid, the said party of the second part, (the trustee Kennedy,) his successor or successors, shall, at the request in writing of the said Rebecca R. Mellen, or the holder of the note aforesaid, proceed to sell and dispose of the said premises as afore-
532 described, or so much thereof as the said party of the second part, or his successor or successors, may deem necessary, at public sale, to the highest bidder, upon such terms and conditions as he may deem most for the interest of all parties concerned in said sale, first giving at least ten days notice of the time, place, and terms of said sale by advertisement in some newspaper printed and published in the city of Washington."

Again, that—

"Out of the proceeds arising from such sale or sales, after paying the proper expenses thereof, and other expenses of this trust, including a commission on the gross amount of said sale or sales of three per centum, as compensation to said trustee, * * * * to pay in the first place whatever of said debt, interest, costs, and expenses may be due and unpaid at the time of such sale, or sales; secondly, to pay whatever of said debt, interest, costs, and expenses may then remain unpaid, although the same may not then
533 have become due and payable; and, lastly, the surplus, if any, to pay over to the said party of the first part, their heirs, &c."

There is also a provision for the payment of taxes, and authorizing the trustee to pay them, in such case making the payment a part of the indebtedness secured by the trust deed.

The advertisement upon which the premises were sold states the following terms:

"Terms of sale:—Five thousand dollars, with interest thereon at the rate of ten (10) per cent. per annum, from January 15th, 1873, together with the expenses of sale, in cash, and the balance at one and two years, for which the purchaser is to give his notes, bearing interest at the rate of eight per cent. per annum, *and secured by deed of trust on the property sold.* Conveyancing at the cost of purchaser. Two hundred and fifty dollars to be paid by the purchaser immediately after sale."

The sale seems to have taken place in conformity with the advertisement, and certainly so far as Mrs. Wallach is concerned, no
534 other view of that sale can be entertained. The rights of Mrs. Burche and Mrs. Wallach were determined by the terms of that sale, unless they have made an independent contract, which prevents them from insisting upon the rights thus acquired.

It is claimed that a contract did exist between Mrs. Burche and Mrs. Mellen, by which Mrs. Burche was to bid in the property, Mrs. Mellen advancing upon a new loan a sufficient amount of money to pay off the taxes upon the property, the interest upon the *the* note, and the expenses of the sale, and to extend the time of paying the original indebtedness, Mrs. Burche agreeing to execute a new note and trust deed as a first lien upon the property. Undoubtedly a contract to this effect was entered into by Mrs. Burche and Mrs. Mellen.

During the argument of the case, the court understood the claim to be made that Mrs. Wallach was either a party to such contract, or that she consented to it and ratified it afterwards. This is a question of fact that can only be determined by the proofs in the case.

535 I have examined the testimony, which is very voluminous, reading it all through with great care, some portions of it more than once, and I fail to find a single particle of proof that Mrs. Wallach was a party to that agreement, or that she ever consented to the same, or ever ratified it in any way; but on the contrary, that constantly from the time of the sale she has insisted

upon her right to her share in the balance of the purchase money or the deferred payments.

A proposition, it is quite true, was discussed between Mrs. Wallach and Mrs. Mellen, or rather the husband of the latter, of the same character; but that was an independent conversation, having no connection with the agreement with Mrs. Burche, and Mrs. Wallach then declined to enter into such an agreement unless Mrs. Mellen would advance sufficient, in addition to the taxes and expenses of the sale, to pay Mrs. Burche her share of the purchase money. This was not accepted, however, and afterwards it
536 appears an arrangement was made with Mrs. Burche, who became the purchaser, and upon receiving from the trustee a conveyance of the property, she executed a trust deed to Mrs. Hain, mother of Mrs. Mellen. The amount of this trust was $8,200, and it was taken in Mrs. Hain's name for the reason that Mrs. Mellen had not a sufficient amount of her own to make the loan; she therefore borrowed $1,000 from her mother, and took the note and trust deed in her mother's name for the purpose of saving the expenses attending the sale of the property, should it become necessary to foreclose for default of payment of the debt or interest thereby created. It appears, however, that Mrs. Mellen has repaid her mother, and is now the holder of the note and the real beneficiary of the trust deed.

It is evident that the agreement between the two ladies under which the property was sold cannot affect the rights and interests of Mrs. Wallach, who was no party to it; and under the principles of law already announced, she would be entitled to a moiety of the balance of the purchase money after
537 the extinguishement of the indebtedness and the satisfaction of the other liens upon the property. This moiety is apparently about $4,400, or a little upwards. No arrangement made subsequently to the sale can affect this interest or deprive her of the benefit to which she was entitled, she never having entered into any arrangement different from the terms advertised, and under which the property was apparently sold. The contract, of course, was binding as between Mrs. Burche and Mrs. Mellen. It is quite true that a creditor may extend such terms and such indulgences as he can agree upon with his debtor, but it cannot be said that such a contract can affect a person standing in the relation to this property that Mrs. Wallach does without her consent. We therefore come to the conclusion that Mrs. Wallach was entitled to her portion of the surplus, and to have it secured as a first lien upon the property, as the payments of such surplus were deferred; she was entitled to her moiety, according to the terms of the adver-
538 tisement, which stated distinctly that such balance was to be at one and two years, for which the purchaser was to give his notes, bearing interest at the rate of 8 per cent. per annum, and secured by deed of trust on the property sold.

Subsequently to all this, the litigation between these parties became somewhat complicated. Mrs. Burche filed a bill in equity against Mrs. Wallach, for an account of rents and profits of this

property after the death of their mother, for the reason that she had occupied the premises and was bound to account for the rents and taxes. In this bill she states her agreement with Mrs. Mellen, as I have already set it forth. She does not pretend that Mrs. Wallach was a party to that agreement, and admits that her apparent share in the balance is over $4,400; and the only relief she asks in the bill is the account of the rents and profits as already stated.

Mrs. Wallach filed a cross-bill and also an original bill, the object of the latter being to set aside the sale for various alleged
539 irregularities. The relief was denied, and the sale was confirmed. She therefore stands upon that sale and her rights under it. During this litigation, the property was sold under an order of the court. There does not appear to have been any supplementary pleadings or formal application leading to this sale. It was, however, by the mutual consent of all the parties that it took place, and in the interest of the property itself, which, during the litigation, was exposed to dilapidation and decay. The parties, therefore, concurred in the advisability of selling the property and bringing the proceeds into court to be distributed to the parties entitled to them without prejudice to any of the pre-existing rights and equities.

From these considerations, it follows that the decree below must be reversed and a final decree entered in the cause giving priority in the distribution to Mrs. Wallach, the basis of such a decree to be the decree of the court below of the 3d of January, 1880, and Schedules A, B, C of the auditor's report of October 29, 1879.
540 From these documents I think the counsel, without any futher reference to the auditor, can intelligently state the account to be embodied in this final decree.

Final Decree in General Term. Filed July 9, '81.

In the Supreme Court of the District of Columbia, the 8th day of July, A. D. 1881.

CATHARINE BURCHE
vs.
SUSAN L. WALLACH *et al.* } No. 3571. Eq. Doc. 13.

and

SUSAN L. WALLACH
vs.
CATHARINE BURCHE *et al.* } No. 4423. Eq. Doc. 15.

These consolidated causes coming on to be heard at this term of the court upon the appeal of Susan Lavinia Wallach, were argued by counsel and submitted, and upon consideration thereof, it appearing clearly that the arrangement made between Catharine Burche and Rebecca R. Mellen to encumber the property mentioned in these proceedings for $8,200, was wholly without the knowledge of Susan Lavinia Wallach, and was never in any manner approved
541 or ratified by said Wallach, and that at the time of the execution of the deed by said Burche, to secure said sum of

$8,200, the said Wallach was entitled to have out of the said property the sum of $3,975.49, with interest at the rate of eight per cent. per annum, from December 8th, 1873; that the rights of said Wallach have been in no respect waived by him, and cannot be affected by any arrangement *concerted* between said Burche and said Mellen. Now it is this 8th day of July, A. D. 1881, ordered, adjudged, and decreed, that the decree passed in the special term on the 29th day of December, A. D. 1880, be, and the same hereby is, reversed, and it is further ordered and decreed that the trustees appointed by the decree passed on Jan'y 3, 1880, be, and they hereby are, directed forthwith to require the purchaser to comply specifically with the terms of the sale reported by them on November 22, A. D. 1880, and in case of the failure or neglect of such purchaser to fully comply with the terms of said sale within thirty (30) days from this date, the said trustees are directed to resell the parcel of land
542 mentioned and described in these proceedings at the risk and cost of such defaulting purchaser. And it is further ordered and decreed that the proceeds of said parcel of land and premises be applied in the first place to the payment of said sum of three thousand nine hundred and seventy-five $\frac{49}{100}$ ($3,975$\frac{49}{100}$) with interest thereon at the rate of eight per cent. per annum, from December 8th, 1873, to said Wallach, and the residue and remainder thereof after such payment to said Wallach to Rebecca R. Mellen. And it is further ordered and decreed that the said Mellen pay the costs of these causes.

And from this decree the said Rebecca R. Mellen, by her counsel, in open court, prays an appeal to the Supreme Court of the United States, and the same hereby is allowed, and the penalty of her appeal bond is fixed at the sum of two thousand ($2,000.)

By the court: MACARTHUR.

543 *Bond of Appeal. Filed July* 18, '81.

In the Supreme Court of the District of Columbia, the 8th day of July, 1881.

SUSAN L. WALLACH *vs.* CATHARINE BURCHE *et al.* } No. 3571. Eq. Doc. 21.

and

CATHARINE BURCHE *vs.* SUSAN L. WALLACH *et al.* } No. 4423. Eq. Doc. 21.

Know all men by these presents, that we, Rebecca R. Mellen, are bound unto the above-named Susan L. Wallach in the sum of two thousand dollars ($2,000.00), to be paid to the said Susan L. Wallack, her executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this — day of July, 1881.

Whereas the above-named Rebecca R. Mellen has prosecuted an appeal to the Supreme Court of the United States to reverse
544 the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Rebecca R. Mellen shall prosecute her said appeal to effect and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

REBECCA R. MELLEN. [SEAL.]

Sealed and delivered in presence of—
A. F. FOX. [SEAL.]
JOHN A. RUFF. [SEAL.]

Approved this 18th day of July, 1881.

A. WYLIE, *Justice.*

545 OFFICE OF TREASURER AND ASSESSOR,
WASHINGTON, D. C., *July* 15, 1881.

This is to certify that real estate to the amount of twenty-four thousand one hundred and sixty-six dollars is assessed on the books of this office in the name of Rebecca R. Mellen.

$24,166. WILLIAM MORGAN,
For Treasurer and Assessor.

OFFICE OF TREASURER AND ASSESSOR,
WASHINGTON, D. C., *July* 13, 1881.

This is to certify that real estate to the amount of fifty-two hundred and thirty-seven dollars is assessed on the books of this office in the name of Albert F. Fox.

$5,237. WILLIAM MORGAN,
For Treasurer and Assessor.

546 OFFICE OF TREASURER AND ASSESSOR,
WASHINGTON, D. C., *July* 13, 1881.

This is to certify that real estate to the amount of fifty-one hundred and fifty dollars is assessed on the books of this office in the name of John A. Ruff.

$5,150. WILLIAM MORGAN,
For Treasurer and Assessor.

547 *Authentication of Record.*

Clerk's Certificate:

CLERK'S OFFICE, SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 29th day of Sept., 1881.

R. J. MEIGS, *Clerk.*
By R. J. MEIGS, JR., *Assistant Clerk.*

Justice's Certificate:

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal, this 29th day of Sept., 1881.

D. K. CARTTER, *Chief Justice.* [SEAL.]

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 29th day of Sept., 1881.

[SEAL.] R. J. MEIGS, *Clerk.*
By R. J. MEIGS, JR., *Assistant Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 361. Rebecca R. Mellen, appellant, *vs.* Susan L. Wallach. Filed October 8, 1881.

OFFICE SUPREME COURT U. S.
FILED
JAMES H. McKENNEY, Clerk.

112-41

U. S. Supreme Court.

OCTOBER TERM, 1883.

No. ~~301~~ 56

REBECCA R. MELLEN, APPELLANT.

vs.

SUSAN L. WALLACH.

Appeal from the Supreme Court of the District of Columbia.

L. G. HINE,
SIDNEY T. THOMAS,
Counsel for Appellant.

U. S. Supreme Court.

OCTOBER TERM, 1883.

No. 361.

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REBECCA K. MELLEN, APPELLANT.

vs.

SUSAN L. WALLACH.

———o———

Appeal from the Supreme Court of the District of Columbia.

———o———

BRIEF FOR APPELLANT.

On the death of their father, William Hewitt, Susan L. Wallach and Catherine Burche became entitled, subject to the life estate of their mother, to those parts of lots 1 and 2, in square 457, in this city, on which houses 400 and 402 6th street, northwest, stand. On the 15th day of January, 1872, these two sisters borrowed $5,000 of appellant, which they divided equally between themselves. This loan was evidenced by their joint and several promissory note, payable five years after date, with interest at the rate of ten per cent. per annum, payable quarterly, secured by a deed of trust upon their interest in said property to J. C. G. Kennedy, trustee. (Record, pp. 2, 3, 4, 5.)

This deed of trust provided *inter alia* "that upon default

or failure being made in the payment of said note the said party of the second part, [trustee] his successor or successors shall, at the request in writing of the said Rebecca R. Mellen, or the holder of the note aforesaid, proceed to sell and dispose of the said premises, or so much thereof as the said party of the second part, or his successor or successors, may deem necessary, at public sale, to the highest bidder, upon such terms and conditions as he may deem most for the interest of all parties concerned in said sale, first giving at least ten days' notice of the time, place and terms of said sale by advertisement in some newspaper printed and published in the city of Washington."

"That out of the proceeds arising from such sale or sales, after paying the proper expenses thereof, and other expenses of this trust, including a commission on the gross amount of said sale or sales of three per centum as compensation to said trustee for his diligence in executing this trust to pay in the first place whatever of said debt, interest, costs and expenses may be due and unpaid at the time of such sale or sales. Secondly, to pay whatever of said debt, interest, costs and expenses may then remain unpaid, although the same may not then have become due and payable; and lastly, the surplus, if any, to pay over to the said parties of the first part, their heirs," &c.

That the grantors should insure the property, but if they should not, the trustee should. That if the trustee should insure "the expense thereof, as well as any taxes, the payment whereof may become necessary, shall thereupon become a debt due and owing by the said parties of the first part, the payment of which shall be secured by this present instrument in all respects equally as if it were a part of said debt now owing by the said parties

of the first part, and every provision herein contained were expressly made applicable thereto."

The mother died December 15, 1872, and Mrs. Burche and Mrs. Wallach, being unable either to pay the interest on their debt to Mrs. Mellen or the taxes accruing against the property, Mr. Kennedy, trustee, at the request of Mrs. Mellen, the holder of the note, advertised the property for sale on the 8th day of December, 1873, for the purpose of collecting the debt.

While the property was being advertised these two sisters, or at least Mrs. Burche, conferred with Mrs. Mellen, and it was agreed that in the event either of them became the purchaser of the property at the sale Mrs. Mellen would not require the cash payment specified in the trustee's advertisement, but would advance to which ever of them became the purchaser such additional sum as was necessary to pay such taxes as has accrued against the property between January 15, 1872, and December 8, 1873, the day appointed for the sale.

The sale took place as advertised, and Mrs. Burche was declared the purchaser at $16,500, a price much in excess of the real value of the property, as the subsequent proceedings clearly show. Thereupon Mrs. Mellen advanced Mrs. Burche the additional sum of $3,200, of which $2,429.02 was used in paying interest on the $5,000 note and taxes and assessments for special improvements existing against the property at the time of sale. The balance, $770.98, Mrs. Burche seems to have kept herself. This amount was excluded in the accounting before the auditor, and was a loss to Mrs. Mellen.

On the 24th of December, 1873, Kennedy, trustee, delivered to Mrs. Burche a deed for the property, (record, pp. 24, 25, 26.) On the same day Mrs. Burche executed and delivered to Mrs. Mellen, trustee, a deed of trust

upon the property to secure Mrs. Hain, her mother, $8,200, (the sum of the $5,000 loan, and the additional advance of $3,200,) evidenced by her promissory note of even date, payable five years thereafter, with interest at 10 per cent., payable quarterly. (Record, pp. 26, 28, 29.) Mrs. Hain had loaned Mrs. Mellen $1,000 of the $3,200 and the object of making the latter beneficiary instead of Mrs. Mellen, was to save expenses in the event of a sale for default in the payment of the debt secured by this trust. Subsequently Mrs. Burche executed and delivered a deed of trust upon the same property to Hyde and Fox, trustees, to secure the payment of two notes she had made to Kennedy, trustee, on the 24th December, 1873, each being for $2,204.30; one being payable at one and the other at two years after date, both with interest at 8 per cent. per annum until paid. These two notes represented Mrs. Wallach's moiety of the surplus of the proceeds of sale. this deed was duly recorded in the proper office in this District. (Record, pp. 29, 30, 31.)

On the 29th of January, 1874, this litigation began. Mrs. Burche filed her bill (No. 3571) against her sister, Mrs. Wallach, and Mr. Kennedy, trustee, for an account as to Mrs. Wallach who had been in the reception of the rents of the property from the death of her mother, Mrs. Susan L. Hewitt (December 15, 1872), to December 8, 1873, the day of sale, and to enjoin Mr. Kennedy from paying over to her any portion of the proceeds of the sale of said property. (Record 1–32.)

On the 16th of June, 1875, Mrs. Wallach filed her bill (No. 4423) against Mrs. Burche and Mrs. Mellen, in which she attacked the sale of December 8, 1873, for fraud, (rec. 65–76.) The answers of the several defendants were duly filed, testimony taken on both sides, the two suits consolidated, and the sale decreed by the gen-

eral term of the court below to be valid, June 5, 1878. From this decree no appeal was taken.

The causes were thereupon referred to the auditor with directions to state an account between the parties, there being a dispute as to the amount due Mrs. Mellen. (Record, pp. 129, 130.) The report (rec., pp. 132, 138,) on the condition of the accounts between the parties being in and the case coming on for hearing on exceptions to the findings of that report, the court below at special term, January 3, 1880, approved the report returned by the auditor and directed a sale of the property through trustees appointed by the court, with liberty to Mrs. Mellen, in case she became the purchaser, to discount her claim of $7,429.02, as reported by the auditor, out of the purchase money. (Record, pp. 149, 150.)

Under this decree a sale took place, but in consequence of the interference of one Blumenberg and Wood it was set aside at the instance of Mrs. Wallach and a re-sale ordered. The last sale took place November 19, 1880, at which Mrs. Mellen became the purchaser at $9,900. This sale was ratified by the court at special term December 29, 1880, and the proceeds distributed by giving Mrs. Mellen priority of payment. (Record, p. 179.)

Mrs. Wallach appealed from this decree to the general term of said court, and that court on the 8th day of July, 1881, reversed the decree of the special term and gave Mrs. Wallach priority of payment. (Record, pp. 191,192.) From this decree Mrs. Mellen took an appeal to this court and assigns for error the action of the court below in giving Mrs. Wallach priority of payment.

ARGUMENT.

The burden of Mrs. Wallach's complaint against Mr. Kennedy's sale is that he changed the terms from the published advertisement, (record, p. 16) so as to make all the purchase money deferred. The deed of trust provided no particular mode of exercising the power of sale. The trustee, in case of default in payment of the debt, was authorized in a general way to sell on such terms as he might deem best for the interest of all parties concerned.

Now, it is well settled where the mode of sale is not defined and the power of the trustee general he may act in any mode which the law would sanction or give effect to.

Sugd. on Pow., 266;
Foster vs. *Green*, 4 Ala., 441;

Such deeds of trust are valid in this district.
Newman vs. *Jackson*, 12 Wheat., 570.

Of course, Mr. Kennedy was not expected to sell for cash. No trustee would be ordinarily justified in selling large and valuable property for cash which would involve necessarily a sacrifice. When he does sell, however it is his duty to apply the cash proceeds and the deferred payments, when collected, first to the satisfaction of the debt, and secondly to any accumulated taxes.

Perry on Trusts, § 602 *l*.

But this was specifically provided for in the deed of trust in the present case.

Mr. Kennedy the trustee advertised upon the terms that $5,000, the amount of Mrs. Mellen's debt and interest should be paid in cash, and the rest in two instalments, at one and two years, secured of course. After the advertisement Mrs. Mellen agreed with Mrs. Burche

that, if the latter should become purchaser at the trustee's sale, she, Mrs. Mellen, would advance the sum necessary to pay the taxes and allow Mrs. Burche to give a new note for the amount of her debt and the taxes at five years, and give separate security for the remaining part of the purchase money. It is charged that this was a collusive arrangement between Mrs. Mellen and Mrs Burche to oust Mrs. Wallach from any interest in the property. There is no evidence of this in the case. It is certain that Mrs. Mellen interviewed Mrs. Wallach on the subject of the purchase by the latter, and Mrs. Wallach seemed to have declined it, unless Mrs. Mellen would advance the money necessary to enable Mrs. Burche to pay Mrs. Wallach her share. Mrs. Mellen was willing to make a smilar arrangement to that mentioned,with either of the two tenants in common. So far then from seeking to injure either, her propositions looked to their mutual interests and advantage. Instead of exacting payment, according to the terms of sale, which was beyond their means, she was willing to indulge them, or either of them, in order to enable them, or one of them, to acquire and save the property. This was entirely proper.

Jones on Mortg., § 1872.

In *Hubbard* vs. *Jarrell*, 23 Md., 75, where the power required the sale to be for cash, and it was made for part cash and part credit, the departure from the power was considered beneficial to the mortgagor and the sale held valid. That case is cited and approved by this court in *Markey* vs. *Langley* 92 U. S., 142.

We see no good reason why a creditor is not at liberty to arrange beforehand, that if his debtor shall become the purchaser at a forced sale, he will make more liberal terms with him than a stranger. Mrs. Mellen had the

right, according to the prescribed terms of sale, to have her debt paid in cash, as well as all accrued taxes. Waiving this privilege, she consents that Mrs. Burche, as purchaser, shall have five years within which to pay her debt; and this was just as much a part of the terms of sale as the printed terms.

This, it is submitted in all confidence, was a proper exercise of the discretionary power reposed in the trustee.

Perry on Trusts, § 602 l; *Id.*, § 602, dd.

The only complaint which could be made against that arrangement would arise in case Mrs. Wallach's share of the surplus proceeds was thereby postponed as to payment. But such was not the scope of this arrangement. If the trustee had taken a single deed of trust to secure Mrs. Mellen's note for the debt and taxes, and to secure the surplus, then if the one and two years notes should not be paid, out of which Mrs. Wallach was to receive her share of the surplus, he would have been compelled to sell the whole property over, and apply the proceeds, first, to pay Mrs. Mellen's note in advance of its maturity,and then divide the surplus. By the arrangement that was made, whereby two separate deeds of trust were taken, one in favor of Mrs. Mellen, and the other in favor of Mrs. Wallach for her share of the surplus, in case Mrs. Wallach notes were not paid, it did not become necessary to sell for the whole indebtedness, but the property could be sold at the end of one or two years, subject to Mrs. Mellen's prior note.

In 1877 the court below at special term held Mr. Kennedy's sale valid, that Mrs. Wallach and Mrs. Burche agreed with Mrs. Mellen that the sale should be made and if either of them purchased at said sales she, Mrs. Mellen, would lend to the purchaser so much money as would be found necessary to pay off the liens and encumbrances

on the property and the arrears of interest on the debt, and add the same to the original debt of $5,000, and to make a new deed of trust as the first lien on the property to secure the entire sum. (Record 65, 66.) Mrs. Wallach appealed to the general term, and that court in 1878, considered this conduct of Mr. Kennedy, the trustee, as a fair exercise of the discretionary power reposed in him and refused to set aside his sale, and on the 5th day of June, in that year, affirmed the decree of the special term. (Record 67, 68, 69.) This was a final decree effecting the merits of the controversy from which Mrs. Wallach was entitled to an appeal if she felt aggrieved. She did not appeal Is not the matter then of that sale *res adjudicata*. But suppose it is not in that category, and that the question is still an open one, and that Mr. Kennedy's conduct is to be impugned, the result is Mrs. Mellen is remitted back to her rights under the deed of trust of 1872—not deprived of her priority; for that would be to punish her because Mr. Kennedy, over whom she had no control, failed to do his duty or erred in judgment—and Mrs. Wallach and her sister, or rather Mrs. Mellen, taking the last sale as a test of value, put to the delay, expense and inconvenience of a re-sale.

Mrs. Mellen secured no advantage by this arrangement of two deeds of trust which she would not have had if a single deed had been taken. In New York, where an agent with the assent of his principal, having included in a mortgage of the latter a debt due from the mortgagor to himself, it was held in the absence of any agreement as to preference that the debt due the principal should first be paid out of the proceeds of the foreclosed sale.

Phillips vs. *Belden*, 2 Edw., (N. Y.,)-1.

In either case Mrs. Mellen was entitled to priority—to have her debt and advance first paid. Her mortgage lien attached to the proceeds of the sale in the the same order and with the same effect as it did to premises before the sale.

Olcott vs. *Bynum*, 17 Wall., 44;
Astor vs. *Miller*, 2 Paige, 68;
Sweet vs. *Jacobs*, 6 Id, 355;
Brown vs. *Stewart*, 1 Md. Ch. *Decis*, 87.

The time for payment of Mrs. Wallach's share of the surplus was not postponed beyond the printed terms of the advertisement by this arrangement of two deeds of trust. Even could this arrangement between Mrs. Mellen and Mrs. Burche be objected by Mrs. Wallach, we think her only remedy was by bill to compel payment by Mrs. Burche according to the printed terms of sale—payment of sufficient cash to satisfy Mrs. Mellen, and then the surplus in one and two years from the day of sale.

But on no ground do we perceive why Mrs. Mellen should lose her priority. If one deed had been taken, providing for a note to Mrs. Mellen at five years and the others at one and two years, some question might have been raised whether Mrs. Mellen had not waived her priority by holding the latter note.

But she had a right in giving indulgence to stipulate that her priority should be preserved, and this arrangement of two deeds of trust of which hers is first recorded, was simply a means of retaining and securing the priority to which she was, in law, entitled. The court below fixed the amount to which she was entitled to be first paid; it consisted of the principal of her debt and arrears of interest, and the amount advanced by her and actually spent in the payment of the taxes and

expenses which had accrued against the property, and this amount, with additional interest to the 19th day of November, 1880, the day of the last sale, it is respectfully submitted, on every principle of equity, she was entitled to be paid first out of the fund. The whole purchase money at the last sale fell short of the indebtedness. Mrs. Mellen, being the purchaser, was allowed to discount or set off her claim against the purchase money due from her, this was entirely proper; it facilitated the execution of the trust. It prevented unnecessary circuity. It would have been an idle ceremony for Mrs. Mellen to have paid the purchase money over to the trustees and then immediately receive it back from them again.

Alex. (Md.) Ch. Pra., 160;
Weld vs. *Rees*, 48 Ill., 428;
Jacobs vs. *Turpin*, 83 Id., 424;
Beal vs. *Blair*, 33 Iowa, 318.

That the property brought nearly seven thousand dollars less in 1880 than it did in 1873 was a most unfortunate circumstance for those interested in the residuum after payment of Mrs. Mellen's debt; but, however unfortunate, it was clearly due to the large and unexpected depreciation in the value of real property, which followed the panic of 1873—one of those things which Mr. Kennedy could not have reasonably anticipated, and for which Mrs. Mellen should not be held responsible.

Hext vs. *Porcher*, 1 Strob. Eq., 172;
Markey vs. *Langley*, Supra.

So far then from Mr. Kennedy having displayed fraud or unfairness in the exercise of the discretionary powers reposed in him, we submit that he not only acted fairly but that he mingled kindness with the administration

of this trust. He appears well in the record. There is absolutely no ground to impugn his sale or for the imputations of unfairness sought to be cast upon him. The court below thought so in 1878, and we are confident this court will think so now.

The decree appealed from should be reversed.

L. G. HINE,
SIDNEY T. THOMAS,
Counsel for Appellant.

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OFFICE SUPREME COURT U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1883.

No. ~~361.~~ 56

REBECCA R. MELLEN, APPELLANT,

vs.

SUSAN L. WALLACH, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

JESUP MILLER,
Of Counsel for Appellee.

JUDD & DETWEILER, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 361.

REBECCA R. MELLEN, APPELLANT,

vs.

SUSAN L. WALLACH, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

The appellee, Mrs. Wallach, and Mrs. Burch, in January, 1872, were tenants in common of a vested remainder in certain realty in the District of Columbia. On January 15 they executed a deed of trust thereon to one Kennedy, to secure to the appellant, Mellen, a note, at five years, of $5,000, and the interest to accrue thereon at 10 per cent. per annum, payable quarter yearly. (R., 2, 69, 85.)

They each paid one-half the installments of interest, in April, July, and October of that year, and Mrs. Wallach (appellee) paid one-half of each installment falling due the next year; but Mrs. Burch failed to pay her half. In December, 1872, the particular estate determined, and the parties became possessed of the realty. In November, 1873, the appellant and her husband came to Washington to enforce the payment of this interest. They first called upon Mrs. Wallach, and ascertained that personal intercourse between her and Mrs. Burch had ceased, and that Mrs. Wallach was desirous to buy the other moiety. The Mellens and Mrs. Wallach negotiated for a further loan to enable Mrs. Wal-

lach to buy and pay for Mrs. Burch's moiety, but no agreement was arrived at. Thereupon, on the direction of the appellant, she advertised to sell the realty under the deed of trust, giving ten days' notice of the terms of sale, as follows (R., 16):

"Terms of sale: Five thousand dollars, with interest "thereon at the rate of ten (10) per cent. per annum, from "January 15, 1873, together with the expenses of sale, in "cash, and the balance at one and two years, for which the "purchaser is to give his notes, bearing interest at the rate "of eight per cent. per annum and secured by deed of trust "on the property sold. Conveyancing at the cost of the pur-"chaser. Two hundred and fifty dollars to be paid by the "purchaser immediately after sale.

"J. C. G. KENNEDY,
"*Trustee.*

"KELLY & GATCHELL,
"*Auctioneers.*"

Thereafter, and before the day of sale, Mrs. Burch, with her husband, went to see the appellant and her husband, and these four agreed together that Mrs. Burch might purchase at the sale, and that the appellant would advance her enough more money to pay the expenses of sale, arrearages of interest, and taxes, and they should give a deed of trust to secure the appellant the whole amount, and should give a second trust upon the same property to secure any residue that might be owing to the appellee. This arrangement was unknown to and unsuspected by the appellee. The trustee, pursuant thereto, on the day of sale permitted Mrs. Burch to purchase, and on December 24, 1873, executed a deed of conveyance to her, and left the deed of trust to secure Mrs. Wallach's moiety of the surplus (in notes payable to his own order and still in his possession) in the hands of the auctioneer, to be retained until a simultaneously executed deed of trust on the same property to secure an alleged debt of the appellant's of $8,200 had been recorded.

Some matters were litigated in these causes which need not now be discussed. The confusion and difficulties in the case grew out of the singular error of the justice at special term in June, 1877, finding an agreement between the three parties under which the terms of sale were fixed. (R., 65.) Not only was there no such agreement, but there was no testimony even tending to establish it. (*Vid.* R., 189.) The court *in banc* in June, 1878, correcting the errors of the special term, modified one decree and reversed the other, (dismissing Mrs. Wallach's bill, omitted in record, appeal noted, R., 128,) and remanded the causes to the special term, with instructions to enter a decree. That the sale to Burch "be confirmed and MADE VALID;" to call for certain accounts "in order to settle the equities of the parties," and finally provided that "*all the equities* between the said par- "ties touching the matters in controversy be, and the same "are *hereby, reserved* until the final confirmation of the re- "port which may be made by the said auditor in the prem- "ises." (R., 129.) This decree is unusual in form; examined critically it will appear that it is ordered—1, that the two causes be consolidated; 2, that the decree in cause No. 3571, special term of June 27, 1877, is modified by "reserving all the equities of the parties;" 3, that the decree in No. 4423 is reversed; and, 4, that the causes are remanded to the special term for certain further proceedings. There is no finality about the decree, and the merits of the case are expressly "*reserved*."

By the decree passed January 3, 1880, the appellee's surplus from the proceeds of this sale "made valid" was ascertained to be $3,975.49, with interest at 8 per cent. from December 8, 1873; the appellant's claim was $7,429.02 of the cash proceeds of sale, and $970.98 advanced to Mrs. Burch separately. (R., 149.) The property has been sold by mutual consent, all parties concurring in the advisability of sale, and bringing the fund into court without prejudice to their rights and equities. (R., 191.)

The order of lien between the appellant and appellee is the only question which is now before the court.

There is, as far as we have been able to see, no example of such a perversion of his powers by any trustee in a reported case. May this always remain *sui generis*, as alone it will suffice to teach the student what to avoid in executing a trust, and point out the ear-marks of fraud. The trustee's powers and duties are expressed (R., 3); large discretion as to terms and conditions of sale are confided to him; but this discretion, as, indeed, all his acts, is subject to the control of a court of chancery.

Greenough *vs.* Wills, 10 Cush., 576.
Eldrige *vs.* Heard, 106 Mass., 58.

He is required to give "*at least ten days' notice of the* time, place, and *terms* of sale by advertisement in some newspaper printed and published in the city of Washington."

It has never been pretended that he gave any other notice of other terms of sale than those in the advertisement. (R., 16.) Those are ordinary terms, and would probably not be disturbed; but had he given notice that he would sell only the equity of redemption, and that for notes, to be secured on the equity of redemption and subject to the encumbrance of the appellant, would not the court of chancery have enjoined him?

Hill on Trustees, 715, 725.
36 Miss., 495.
11 Gratt., 348.

Powers of sale must be strictly, literally, and precisely pursued.

Powell *vs.* Tuttle, 3 Comst., 396.
Waldron *vs.* Chastney, 2 Blatchf., 62.
Taylor *vs.* Atkins, 1 Burr, 60.
1 Tex., 225.
1 Mo., 520.
10 Mo., 75.
Ormsby *vs.* Tarascon, 3 Litt., 405.

Conditions precedent must be complied with.

Roarty *vs.* Mitchell, 7 Gray, 243.
Dutton *vs.* Colton, 10 Iowa, 408.
Hawkins *vs.* Kemp, 3 East., 410.
Greenleaf *vs.* Queen, 1 Pet., 138.

The justice, in special term, (R., 177,) did "not see that this arrangement was in any sense wrong. * * * Mrs. Mellen had the right, according to the prescribed terms of sale, to have her debt paid in cash, as well as all accrued taxes. Waiving this privilege, she consents that Mrs. Burch, as purchaser, shall have five years within which to pay her debt; and this is just as much a part of the terms of sale as the printed terms." Then, had Mrs. Wallach no rights? Not the right to "at least ten days' notice" of the terms of sale? Not the right to her "surplus" [which is what is left after the payment or extinguishment of the lien] free from liability for the payment of the lien which her equity of redemption has been sold to extinguish? Not the right, expressly reserved by contract, "to have, hold, use, occupy, possess, and enjoy said premises," &c., "and the rents, issues, and profits thereof to take, receive, and apply?" The rents appear to have been about $1,700 per annum. (R., 106, 113.)

Again, the justice in special term did "not see why a creditor is not at liberty to arrange beforehand, that if his debtor shall become the purchaser at a forced sale he will make more liberal terms with him than with a stranger." We think this self-evident so long as the debtor and creditor are dealing only with what belongs to them, or either of them. The whole argument of the justice at special term is tinctured by the fallacy of supposing that Mrs. Mellen and Mrs. Burch were dealing with their own. That is not this case. The appellant and Mrs. Burch certainly were at liberty to deal with their own as they might agree, but it was well said by the justice delivering the opinion of the court *in banc*, reversing the decree of the special term: "It is evi-

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Supreme Court of the United States.

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SUSAN L. WALLACH, APPELLEE.

LUTHER H. PIKE,
For Appellee.

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REBECCA R. MELLEN, APPELLANT,

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SUSAN L. WALLACH, APPELLEE.

The record in this case is not happily framed to facilitate the work imposed on this Court of ascertaining just what question is presented for its consideration and determination.

It is literally overloaded with husks—better calculated to obscure than help to an easy understanding of what is really involved for consideration.

In the following statement of the case it is not attempted to set forth every fact involved in the history of the case. The aim is to give only those believed to be material to an understanding of what is before the Court for consideration.

Statement of the Case.

Mrs. Burche and Mrs. Wallach, having borrowed of Mrs. Mellen $5,000, gave her, January 15, 1873, their joint and several note at five years for it and conveyed by trust deed to Joseph C. G. Kennedy a piece of property in the city of Washington they owned as tenants in common to secure

payment of that note and the interest, that was made payable quarter annually.

The first three installments of interest were paid, each of the ladies contributing an equal one-half for each, as each had taken for her individual use one-half of the $5,000 borrowed.

In consequence of Mrs. Burche's failure to contribute, only one-half of the 4th, 5th, 6th, and 7th installments were paid. The one-half payments were made by Mrs. Wallach.

Mrs. Mellen, because of these defaults, ordered, and the mortgagee, Kennedy, obedient thereto, after advertisement, sold, December 8, 1873, the mortgaged premises, it bringing $16,509.66.

The litigation was the outcome of this sale.

Before this sale was made Mrs. Mellen and Mrs. Burche entered into an agreement looking to Mrs. Burche becoming the purchaser at that sale.

It was, that if Mrs. Burche should outbid all others and be declared the purchaser, Mrs. Mellen should loan her money enough to pay the expenses of the sale, the taxes and assessments on the property, and the interest due and unpaid on the day of sale, and Mrs. Burche should give her note for the amount of the new loan added to the $5,000, with interest, and a mortgage of the property to secure it.

As stated, the sale was made December 8th, 1873, and Mrs. Burche was declared the purchaser. It was then arbitrarily determined between Mrs. Mellen and Mrs. Burche that $3,200 should be the amount of the new loan.

Mrs. Mullen paid over the $3,200, and Mrs. Burche gave her note *to Mrs. Hain* for $8,200 and a mortgage of the property to Mrs. Mellen to secure its payment. (Record, p. 26.)

Kennedy, the first mortgagee, and Mrs. Mellen and Mrs. Burche determined that the surplus proceeds of the sale to be distributed between the mortgagors, Mrs. Burche and Mrs. Wallach, amounted to $8,817.20, or $4,408.60 to each, and Mrs. Burche thereupon made her two notes to Kennedy for

Mrs. Wallach, each for $2,204.30, and a mortgage of the property to Hyde & Fox to secure payment of them. (Record, p. 29.)

Mrs. Wallach repudiated the sale and all things done under it, and the litigation began by Mrs. Burche exhibiting her bill. (Record, pp. 1–11.)

Its aim was to enable Mrs. Burche to avoid paying anything on her two notes for Mrs. Wallach by saddling her, upon one pretext or another, with the payment of the $3,200 and other charges brought forward.

Mrs. Wallach answered. (Record, pp. 12–19.) Then filed a cross-bill. (Record, pp. 19–32.)

The cross-bill demurred to (Record, p. 32) was abandoned.

Afterwards Mrs. Wallach exhibited her original bill. (Record, pp. 69–76.)

The aim of this bill was to have the sale set aside upon the several grounds set forth.

The two cases were consolidated, and heard first by the supreme court of the District of Columbia in special term. The decree sustained the sale. On appeal from this that court affirmed it, and remanded the cases for further proceedings.

The cause being back in special term, and there being a great consumption of time in having matters audited, it came to pass, as Mrs. Burche was in default in her purchase, that the court, by common consent, ordered a foreclosure sale under the Burche mortgages, by trustees appointed by the court. (Record, p. 149.)

The trustees made the sale, but as it did not bring enough to satisfy the claims of Mrs. Wallach and Mrs. Mellen, *the controversy before the court was reduced to the single question: which of these was entitled to priority of payment out of the proceeds of this last sale.*

The court in special term decided in favor of Mrs. Mellen. (Record, pp. 176–179.)

But on appeal, the general term, reversing this, decided

in favor of Mrs. Wallach, (Record, pp. 187–192,) and the case is before the court on appeal from this last decree.

Argument.

The trust deed to Kennedy was a mortgage.

Gardner *vs.* Brown, 21 Wall., 40.

It is only necessary to read what is elementary law to arrive at a correct conclusion in respect to the question presented for decision.

This mortgage continued until barred by lapse of time, by strict foreclosure, or by deed given in completion of a foreclosure sale.

Jones, Sec. 1052.

Kennedy interposed as trustee; was the mortgagee.

Olcott *vs.* Bynum, 17 Wall., 56; 92 U. S., 142.

He was selected as a disinterested person to act impartially as agent of both mortgagors and the beneficiary, Mellen, creditor, and was bound, therefore, to perform the duties imposed on him in and by the mortgage with the strictest impartiality.

Jones, Sec. 1771.

Supra, 92 U. S., 155.

In determining the extent of a power the intention of the parties in its creation must constitute the guide.

Montague *vs.* Dawes, 14 Allen, 369.

The deed itself is the authority for the execution of the trust, and it may contain such provisions about the execution of the trust as the parties see fit to make.

Jones, Sec. 1790.

The power of sale in this mortgage was a trust power, so

far as it related to the interest in the property, or in the proceeds of it, above the amount due the beneficiary.

Jones, Sec. 1911.

The trustee is a mere instrument to execute the purpose of the grantor, and he is clothed with the legal estate merely for that purpose.

Jones, Sec. 1788.

The terms of the deed fix the rights of the grantor as to the redemption of the estate, as well as the rights and duties of the trustee in doing what answers to a foreclosure of the same by a sale of the premises.

2 Washburn Real Prop., p. 81.

The power to Kennedy authorizes him to sell the mortgaged property only as the mortgage provided he should sell. These requirements of the mortgage were conditions upon which the foreclosure of the mortgagor's equity of redemption depended. He was bound to strictly comply with all the essential requisites of that power.

Jones, Secs. 1789, 1822, 1829.

The legitimate purpose, for which the power to sell was given him, was to secure to the beneficiary repayment of the amount of her mortgage money.

Robertson *vs.* Norris, 4 Jur. U. S., 155, 443.

Jones, Sec. 1801.

"And the trustee may foreclose without the aid of the court, *upon complying with the terms of the deed in making the sale.*"

Washburn R. P., p. 82.

The sale is by virtue of the power, and not of the decree, when the court enforces the power. * * * The court may also appoint a commissioner to make the sale instead of the trustee, but he must pursue the provisions of the deed

as to the terms and mode of sale. The court cannot set aside the deed of trust in any respect.

Jones, Sec. 1775.

The advertisement should fully comply with the terms of the power.

Terms of sale advertised in conformity with the provisions of the deed are as much a part of the deed as if it expressly directed them to be made in that specific manner.

Jones, Sec. 1853.

A sale by the mortgagee, under the power of the mortgage, is a species of foreclosure.

Jones, Sec. 1773.

A sale under a power is equivalent to a foreclosure, and sale under a decree in equity operative in the same manner and to the same extent.

Jones, Secs. 1897, 1898.

It is the foreclosure contemplated by the parties.

Jones, Sec. 1229.

The foreclosure must be for the legitimate purpose of the power.

Jones, Sec. 1801.

The only proper object of a foreclosure suit in equity is to bar the mortgagor and those claiming under him.

Jones, Sec. 1445.

The beneficiary may either compel the sale of the estate, in order to get the whole of his money immediately, or else call upon the mortgagor to redeem his estate presently, or in default thereof to be forever foreclosed from redeeming the same.

Owings *vs.* Beale, 3 Litt., (Ky.) 103.

Chadbourne *vs.* Foster, 29 Iowa, 181.

When it is apparent that the object of a foreclosure suit *is not to procure the satisfaction of the debt*, but to obtain a different end, a court of equity will prevent an improper use of its process, even in a legal way.

Jones, Sec. 1447.

If in any case it is attempted to pervert the power from its legitimate purpose, and to use it for the purpose of oppressing the debtor, or of enabling the creditor to acquire the property himself, a court of equity will enjoin the sale, or will set it aside after it is made.

Jones, Sec. 1801.

When the holder of a mortgage with a power of sale is requested by the mortgagor, or some other party in interest to exercise it, a default being designedly permitted in order to make the power exerciseable, and is part of the arrangement that the mortgage debt should be again lent to the purchaser, it is doubtful that a sale made upon such arrangement would be valid.

Jones, Sec. 1802.

Dart's Ven. & Pur., 5th ed., p. 75.

But the mortgagee with a power must exercise it in a provident way, with a due regard to the rights and interests of the mortgagor in the surplus money to be produced by the sale. *If he uses his power for any other purpose than to secure repayment of his mortgage money*, as for instance, to exclude the mortgagor from the premises for ulterior purposes in the mortgagee, or those for whom he acts, it would be a fraud for which the court would set aside the sale and permit the mortgagor to redeem.

2 Washburn R. P., p. 76.

The rights of all parties are fixed at the time of the sale.

Jones, Sec. 1933.

The foreclosure is complete when the sale is consummated by the trustee delivering his deed to the purchaser.

Jones, Secs. 1052, 1798.

The trustee's deed relates back to the day of sale.

Jones, Sec. 1224.

The sale contemplated cuts off all right of redemption in the mortgagor from and after the day of sale. Extinguishes it.

Jones, Secs. 1905, 950.

When the sale has been made the interest of the mortgagee is wholly divested, including all right of redemption.

2 Washington R. P., p. 78.

The purchaser at the sale acquires the title of the mortgage, and also the title of the mortgagor as it stood at the time of the making of the mortgage.

Jones, Sec. 1654.

By the sale the land is turned into money, *which is to be applied in the first instance to the payment of the debt and expenses of the mortgagee*, and any surplus to the same persons the land belonged to at time of sale. *Their respective rights in the fund are not affected by the sale; and the court will apply the money according to the rights of the parties as they existed at the time the real estate was turned into money;* i. e., *at the time the sale was made.*

Jones, Secs. 1935, 665.

The surplus belongs to the person who is at the time of the sale the owner of the equity of redemption.

Jones, Sec. 1934.

By the foreclosure sale the mortgagor's right of redemption is converted into a claim upon the surplus money in the mortgagee's hands.

Jones, Sec. 1933.

All the cases recognize the doctrine that the surplus is equitably real estate, and should go to the persons who would be entitled to the equity of redemption.

Jones, Sec. 1931.

And though the mortgagor has a right to insist upon being paid any surplus arising from the sale of the premises, after paying the encumbrance in money, the mortgagee may sell upon credit, *accounting for such surplus in money.*

2 Washburn, R. P., p. 75.

Generally, upon a sale of the mortgaged property, either under a power or by a decree of a court of equity in a foreclosure suit, or upon a judgment for the debt, *the mortgage debt is extinguished to the amount of the purchase money.*

Jones, Sec. 953.

Foreclosure, when complete, IS A SATISFACTION OF THE DEBT *to the amount of the value of the property* at the time when the mortgagor's right was extinguished, *and when the mortgaged premises are of greater value than the debt, of course the debt is fully satisfied.*

Jones, Secs. 950, 1264, 1567.

When it is proper to sell the whole mortgaged premises together, the whole debt may be retained from the proceeds.

Jones, Sec. 1838.

The debt being fully paid by a sale, the purchaser is not entitled to hold the note or bond for the greater security of his title without the debtor's assent, inasmuch as he is entitled to have the evidence of the debt delivered up to him and canceled.

Jones, Sec. 953.

The mortgage is extinguished by such sale.

Jones, Secs. 953, 1938, 904, 943.

The power conferred upon Kennedy was upon a default in payment of any installment of interest or the principal, and upon written request of the note-holder to sell the property, or so much of it as he might deem necessary, at public sale to the highest bidder, upon such terms and conditions as he might deem most for the interest of all parties concerned in the sale, first giving at least ten days' notice of the time, place, and term(s) of sale by advertisement in some newspaper, * * * and out of the proceeds, after paying the proper expenses of the sale and other expenses of the trust, including a commission to him of 3 per cent. on the gross sum of the sale, to pay whatever of the debt, interest, costs, and expenses should be due and unpaid at the time of the sale, and the surplus, if any, to the mortgagors. (Record, p. 3.)

There was a provision for taxes paid by Kennedy or Mrs. Mellen becoming a debt due from the mortgagors, whose payment was secured by the mortgage, but as neither Kennedy nor Mrs. Mellen paid any taxes, this provision cuts no figure in the controversy.

Kennedy advertised the terms of sale as follows: "Five thousand dollars, with interest thereon at the rate of ten (10) per cent. per annum from January 15, 1873, together with the expenses of sale, in cash, and the balance at one and two years, for which the purchaser is to give his notes, bearing interest at the rate of eight per cent. per annum, and secured by deed of trust on the property sold. Conveyancing at the cost of the purchaser Two hundred and fifty dollars to be paid by the purchaser immediately after sale." (Record, p. 16.)

The sale took place as advertised—the property not being sold subject to the unpaid taxes and assessments.

Consequently, what these amounted to was to be deducted from the money arising from the sale.

Jones, Secs. 1683, 1649.

Kennedy estimated them at $1,845.31, and deducted that sum from the gross amount bid for the property. He deducted the further sum of $5,847.14 on account of principal and interest of the debt and expenses of the trust and sale.

The total amount deducted was $7,692.45, and the deduction was made in order to determine the surplus for distribution between the two mortgagors.

See his account, Record, p. 145, and testimony as to it, p. 113.

The only cash paid by Mrs. Burche on account of her purchase was $2,429.02 out of the $3,200 she got from Mrs. Mellen under the agreement between them hereinbefore mentioned. The items paid by her are given. (Record, p. 148.)

But as to Mrs. Wallach there was, in law and in fact, an extinguishment of all indebtedness on account of encumbrances on the property on the day of sale, December 8, 1873.

The deduction of the $7,692.45 from the gross sum bid for the property—one-half of it from her one-half interest in the sum so bid—was an application by Kennedy of so much of her money as was required to discharge her share of the indebtedness on the different accounts.

It was, in fact and in law, her contribution for and payment of her share of that indebtedness.

The sale, as to Mrs. Wallach, was a complete and perfect sale. That she was foreclosed, and her ownership of the property destroyed by it, is beyond all possibility of doubt. From the day of sale she has been held to have no direct interest in and use and benefit of the property *as owner*. She was charged with rent for the time she occupied it after the sale. (Record, p. 136.)

The note for $8,200 made by Mrs. Burche alone to Mrs. Hain, and the mortgage executed by her alone to Mrs. Mellen to secure that note, proceeded upon no other hy-

pothesis. The same thing is to be said of her notes to Kennedy for Mrs. Wallach, and her mortgage to Hyde & Fox to secure them.

The court below sustained the sale on the contest over it between Mrs. Mellen and Mrs. Burche contending for and Mrs. Wallach against it. Mrs. Wallach has not appealed, and Mrs. Mellen, appellant, is estopped from denying that Mrs. Wallach was foreclosed, sold out, by Kennedy's sale.

The sale made, $3,846.22½ were taken from Mrs. Wallach's one-half of the $16,509.66 bid by Mrs. Burche for the property. The two notes made by Mrs. Burche to Kennedy for Mrs. Wallach are for the aggregate sum, $4,408.60, this being one-half of $8,817.21 that remained of the $16,509.66, after Kennedy's deduction of the $7,692.45. (Record, pp. 29, 145.)

From the day of sale Mrs. Wallach has not had and cannot have, now or hereafter, any benefit from the property in right of her ownership prior to the sale.

From that time she has not had, nor can she have now or hereafter, any benefit from the $3,846.22½ taken from her unless applied, as of the day of sale, on account of and in satisfaction of her proper share of the indebtedness on the day of the sale.

She has all along been entitled to the $3,846.22½, and proper interest on them, or to her interest as owner in the property. She has not been deprived *equitably* of both.

Consider this in connection with the fact that the mortgage to Mrs. Mellen to secure the $8,500 note to Mrs. Hain was recorded two weeks before that to Hyde & Fox to secure the two notes to Kennedy for Mrs. Wallach, and, as the interest on the note to Mrs. Hain was made payable quarterly, whilst on the notes for Mrs. Wallach it was not, could be foreclosed long before the Hyde & Fox mortgage, it is easy to see that all assertions that the Burche-Mellen agreement looked to the mutual interest and advantage of Mrs. Burche and Mrs. Wallach are veriest rot.

As we have seen, the foreclosure could be legitimately for but one purpose—the repayment to the creditor, Mellen, of the money loaned by her and secured by the mortgage—the extinguishment of that debt.

To hold that Mrs. Wallach was sold out and the debt in no wise extinguished, though the property brought a much larger sum than the debt, and though the proper amount of her share of the purchase money was taken to be applied in satisfaction of her one-half of the indebtedness, would be simply monstrous.

Such a result could be wrought only by a contract on her part looking most unquestionably to it.

It was a point of Mrs. Mellen's and Mrs. Burche's contest against her that she was a party to such a contract, to wit, the Burche-Mellen agreement.

There is not a particle of proof to sustain the proposition. The auditor so reported (Record, p. 147), and the court in general term so held. (Record, p. 189.)

The sale having foreclosed Mrs. Wallach, and extinguished the debts as to her, the securing to her of her share of the surplus of the proceeds of the sale necessarily took precedence of all other obligations, and it was not possible for Mrs. Mellen and Mrs. Burche by their agreement to subordinate it to the note given by Mrs. Burche to Mrs. Hains.

In other words, Mrs. Mellen and Mrs. Burche could not keep alive against Mrs. Wallach without her consent the debt that had been extinguished as to her.

As Mrs. Wallach has never waived her right in any way, the decree appealed from was eminently correct, and it is respectfully submitted it should be sustained.

Real estate in the city of Washington has greatly appreciated in value since Mrs. Mellen purchased in 1880, and were the property to be fairly sold to-day it would come quite near bringing enough to satisfy the claims of both Mrs. Mellen and Mrs. Wallach.

But court decisions are not to be rendered with an eye to

the price of property, as it runs up and down the gamut under the influence of speculation and other causes.

We had too much of that in this cause whilst pending in the court below.

Under the enhancement of value, Mrs. Mellen will lose nothing by Mrs. Wallach having priority of payment.

But if it were possible for Mrs. Mellen to have priority, then would Mrs. Wallach's situation be pitiable indeed, with her one-half interest in the property lost to her in consequence of the Burche-Mellen agreement, and nothing to look to in place of it but Mrs. Burche's worthless notes—worthless, because Mrs. Burch was at the time she made them under the disability of coverture, and because she, having no other property, only counted on paying her $16,509.66 bid for it out of the rents she vainly expected to receive from it. (Record, pp. 78, 120.)

Respectfully submitted.

LUTHER H. PIKE,
For Appellee.

112-41

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 56.

REBECCA R. MELLEN *vs.* SUSAN L. WALLACH.

W. B. Webb,
T. Jesup Miller,
Counsel for Petitioners.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 56.

REBECCA R. MELLEN *vs.* SUSAN L. WALLACH.

To the Honorable the Supreme Court of the United States:

The petition of Susan L. Wallach in the above-entitled cause shows to this Honorable Court that she is much aggrieved by the decree made therein by this Court, and respectfully shows—

That she is appellee in above-entitled cause.

The litigation was commenced by Katherine Burche filing a bill in the supreme court of the District of Columbia to recover certain claims upon your petitioner from her interest in the proceeds of sale of certain realty, apparently of the value of $4,408.60. The appellee answered the bill, (12,) and filed her cross-bill, (19,) to which demurrer was filed, (32); whereupon, as the demurrer was good, because the cross-bill had introduced a new party, the appellant, the cross-bill was abandoned and an original bill was filed (69) to set aside a sale of your petitioner's property and for general relief (76). After proof was taken the two causes were heard on June 27, 1877, in the special term, and your petitioner's bill dismissed, and relief granted to Katherine Burche under her bill (66). On appeal to the general term (129) the findings of the special term were reversed, and the causes consolidated and *remanded* to the special term, with directions for further proceedings, and, among others, to enter

a decree that the sale from Kennedy, trustee, to Katherine Burche be confirmed and made valid; and further decreed (130) "that all the equities between the said parties touching the matters in controversy in these causes be, and the same are hereby, reserved until the final confirmation of the report which may hereafter be made by the said auditor in the premises."

Your petitioner was advised and believed that this was not a final decree, was not appealable.

In pursuance of the mandate of the general term the causes afterwards came on to be heard in special term, and although that court did not obey the mandate by entering a decree confirming the sale of Kennedy to Burche, it adjudged a distribution of the proceeds of that sale, giving to your petitioner the sum of $3,975.49, "for her share of the net proceeds of the sale of said property on December 3d, 1873," and, further, decreed a sale of the property (149).

Your petitioner is advised and believes that the decree for sale was entered on the oral request of Catherine Burche's solicitor, and his statement that she was not financially able to pay either amount found to be due from her.

That thereafter a sale was made, and the causes came on to be further heard on "the equities between the parties respecting the matters in controversy," and especially respecting the priority of the claims of your petitioner and the appellant. The special term decided in favor of the appellant, (177,) and decreed accordingly.

Your petitioner appealed to the general term, and, after hearing, that court decided in favor of your petitioner (187), and decreed accordingly; and the appellant thereupon brought the causes to this Court by appeal, and this Court held and decided at this term:

That all parties have by their action abandoned the sale by Mr. Kennedy, and acquiesced in the subsequent sale to Mrs. Mellen. It follows from this that all claim of Mrs. Wallach to any surplus from the sale by Mr. Kennedy is

gone. Mrs. Mellen, instead of exacting on the sale in cash her $5,000, was willing to leave it to be still a first lien on the property. Her priority of lien, as established by the decree of January 3d, 1880, which was not appealed from, extended to the sum of $2,249.02, beyond the $5,000, as money which she had paid to discharge interest, costs, expenses, and taxes which were made a lien on the property by the trust deed to Mr. Kennedy. That amount was, with the $5,000, embraced in the $8,200 covered by the deed of trust made by Mrs. Burche. But, to the extent of $7,429.02, with the interest awarded by the decree of December 29th, 1880, Mrs. Mellen's claim stands, and has never been satisfied. It is a first lien under the trust deed to Mr. Kennedy, which remains to be enforced for the benefit of Mrs. Mellen, the sale under that deed being, as shown, out of the way, by assent of all parties. Mrs. Mellen has never waived that claim and lien. She asserted them by taking the trust deed from Mrs. Burche, to which we see no valid objection, so far at least, as the amount for which she had a lien at the date of Mr. Kennedy's sale is concerned, and which is the amount allowed her by the court in special term as a lien. She has asserted the same claim and lien constantly ever since. She did not abandon them by assenting to the resale provided for by the decree of January 3d, 1880. In fact that decree, so far as the $7,429.02 adjudged by it to be due to Mrs. Mellen and to have been a lien on the property on the day of Mr. Kennedy's sale, and so far as Mrs. Mellen's claim to that extent is concerned, may properly be regarded as ordering a resale to enforce Mrs. Mellen's rights under the deed of trust to Mr. Kennedy. Such is its effect. Astor *v.* Miller, 2 Paige, 68; Olcott *v.* Bynum, 17 Wall., 63; Mackey *v.* Langley, 92 U. S., 142, 155.

Your petitioner further says that it abundantly appears by the record that Katherine Burch, in January, A. D. 1874, entered into possession of your petitioner's said property, (Jos. F. Kelly, R., 106; A. F. Fox, 113,) and that she continued such possession until the sale made under the decree of January 3, 1880, (R., 160, 161, and 162); that this possession was obtained (*vide* statements in opinion of court in general term, R., 189 and 190) through the connivance of the appellant; she appears to have joined in the deed (R., 24) by which the